

Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall

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The staff of the *Iowa Law Review*, despite their diligence, discovered that some small percentage of the sources I relied upon could not be physically cite-checked in the year of this article's production. I alone am responsible for errors that may persist in recording these citations.

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Professor Kingsfield picked a name from the seating chart. . . .

Without turning, he said crisply, "Mr. Hart, will you recite the facts of Hawkins versus McGee?"

When Hart, seat 259, heard his name, he froze. Caught unprepared, he simply stopped functioning. Then he felt his heart beat faster than he could ever remember its beating and his palms and arms break out in sweat.

Professor Kingsfield rotated slowly until he was staring at Hart. The rest of the class followed Kingsfield's eyes.

"I have got your name right?" Kingsfield asked. "You are Mr. Hart?" He spoke evenly, filling every inch of the hall.

A barely audible voice floated back: "Yes my name is Hart."

"Mr. Hart you're not speaking loud enough. Will you speak up?"

Hart repeated the sentence no louder than before. He tried to speak loudly, tried to force the air out of his lungs with a deep push, tried to make his words come out with conviction. He could feel his face whitening, his lower lip beat against his upper. He couldn't speak louder.

"Mr. Hart will you stand?"

After some difficulty, Hart found, to his amazement, he was on his feet.

"Now, Mr. Hart, will you give us the case?"

Hart had his book open to the case: he had been informed by the student next to him that a notice on the bulletin board listed Hawkins v. McGee as part of the first day's assignment in contracts. But Hart had not known about the bulletin board. Like most students, he had assumed that the first lecture would be an introduction.

His voice floated across the classroom: "I . . . I haven't read the case. I only found out about it just now."

Kingsfield walked to the edge of the platform.

"Mr. Hart, I will myself give you the facts of the case. Hawkins versus McGee is a case in contract law, the subject of our study. A boy burned his hand by touching an electric wire. A doctor who wanted to

experiment in skin grafting asked to operate on the hand, guaranteeing that he would restore the hand 'one hundred per cent.' Unfortunately, the operation failed to produce a healthy hand. Instead, it produced a hairy hand. A hand not only burned, but covered with dense matted hair."

"Now, Mr. Hart, what sort of damages do you think the doctor should pay?"

Hart tried to remember the summation he had just heard, tried to think about it in a logical sequence. But all his mental energy had been expended in punching back mental shock waves from the realization that, though Kingsfield had appeared to be staring at a boy on the other side of the room, he had in fact called out the name Hart. And there was the constant strain of trying to maintain his balance because the lecture hall sloped toward the podium at the center, making him afraid that if he fainted, he would fall on the student in front of him.

Hart said nothing.

"As you remember, Mr. Hart, this was a case involving a doctor who promised to restore an injured hand."

That brought it back. . . .

"There was a promise to fix the hand back the way it was before," Hart said.

Kingsfield interrupted, "And what in fact was the result of the operation?"

"The hand was much worse than when it was just burned. . . ."

"So the man got less than he was promised, even less than he had when the operation started?"

Kingsfield wasn't looking at Hart now. He had his hands folded across his chest. He faced out, catching as many of the class's glances as he could.

"Now, Mr. Hart," Kingsfield said, "how should the court measure the damages?"

"The difference between what he was promised, a new hand, and what he got, a worse hand?" Hart asked.

Kingsfield stared off to the right, picked a name from the seating chart.

Hart fell back into his seat. . . . Across the room, a terrified, astonished boy with a beard and wire-rimmed glasses was slowly talking about the hairy hand.¹

The reader unaccustomed to legal education may wonder at Hart's struggle, which seems needlessly wrought by a capricious bastard. To some lawyers, the scene is likely one of harsh nostalgia. To others, the scene is a model of that most idiosyncratic form of legal pedagogy, the case method. Used in the lecture halls of American law schools for a hundred years, the case method is more reviled than beloved. Many of its

1. John Jay Osborn, Jr., *The Paper Chase* 6-9 (1971). For a discussion of this work and its most infamous rivals in a broader context, see Arthur D. Austin, *The Waste Land of Law School Fiction*, 1989 Duke L.J. 495 (book review). For an education professor's discussion of Kingsfield's lectures as eristic and not Socratic, see J. T. Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. Legal Educ. 529 (1980).

practitioners accept its dominance blindly, assigning casebooks and preparing questions for classes without regard either for why they do so or for how well they do so, and with little thought of other teaching methodologies.² And yet the fuller history of the American law lecture and coursebook suggests that such regard is the basis for healthy skepticism both of defenses and of assaults on case method instruction. This article chronicles the methods and books chosen by law professors for the American lecture hall in the last two centuries, glancing occasionally at some of the rationales for such choices and some of their, often unintended, effects.³

I. INTRODUCTION: THE SCIENCES OF LEGAL PEDAGOGY

We routinely imagine the history of the law lecture in methodological epochs framed by books and men. Commentators, such as William Blackstone, James Kent, and Joseph Story, were followed by organizers, Thomas Cooley, John Norton Pomeroy, and Theodore Dwight, and then by scientists, Christopher Langdell and James Barr Ames. Lastly came the modernists, numerous and (so far) uncanonized, blazing paths with new theory and technology.⁴

2. Of course, there is a bundle of scholarship criticizing the use of the case method, as well as examining its moment of creation. Fine recent examples include the work of Paul Carrington and his commentators. See Paul D. Carrington, *Hail! Langdell*, 20 L. & Soc. Inquiry 691 (1995) [hereinafter Carrington, *Hail! Langdell*]; Laura Kalman, *To Hell with Langdell*, 20 L. & Soc. Inquiry 771 (1995); William P. LaPiana, *Honor Langdell*, 20 L. & Soc. Inquiry 761 (1995); John Henry Schlegel, *Damni Langdell*, 20 L. & Soc. Inquiry 765 (1995). The bevy of exclamation points alone suggests the passion with which the topic is greeted by those concerned with this particular teaching method. Oddly, such concern for the origins of our currently popular teaching method has not generally corresponded with concern for its predecessors.

3. In an article devoted to methods of the *lecture hall*, the reader might bear in mind this caveat: Legal education is increasingly specialized, splitting off from the lecture hall teaching functions specific to clinics, writing classes, research classes, moot courts, and specialized skills courses. Part of the history of lecture-hall pedagogy is thus a history of what is absent from it, as these critical experiences have been excised from the large classroom. To a degree, this failing is perpetuated below, mitigated by the concern for these subjects elsewhere, particularly two projects now in production, Michael Clozen et al., *The History of Legal Education* (forthcoming 1997), and Steve Sheppard, *The History of the American Law School: A Comprehensive Selection of Essays* (forthcoming 1999) [hereinafter Sheppard, *Law Schools*].

4. Such a chronicle is often followed, in the broadest sketch, by respected legal historians. See, e.g., Albert J. Harno, *Legal Education in the United States* (1980); Alfred Zantlinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with some Account of Conditions in England and Canada* (New York, Carnegie Found. for the Advancement of Learning, Bull. No. 15, 1921); William P. LaPiana, *Logic and Experience: American Legal Thought and Legal Education, 1800-1920* (1987) (unpublished Ph.D. dissertation, Harvard University) [hereinafter LaPiana, *Dissertation*]. Of course, there are many valid heuristics that do not comport with this template view. See, e.g., William P. LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (1994) [hereinafter LaPiana, *Logic and Experience*];

While this popular view is facially accurate, it is overly simple. The history is far subtler than this; the apparent conflicts between views were rarely so sharply defined as they may now seem. There is often as much in common as there is exceptional between various teaching modes, and preoccupation with the tools of pedagogies may obscure more fundamental agreements and quarrels ranging among all of the methods. One way to read both the commonalities and disagreements is to consider the following model.

In general, the law professor brings order to a vast tangle of laws. To do so, the teacher must both educate the students in the generic methods of legal analysis and train them in the specific application of particular legal principles to a given cause. Even though pursuing one end may distract from the pursuit of the other, the two ends are interdependent; the rules are used to teach rationale, and the rationale is necessary to make sense of the rules.

There is an inevitable pattern to the order that is the end of each of these competing forms. The professor must encourage the student to grasp and recall certain ideas. While doing so, the professor must also inspire imagination and analysis, so that specific rules may be selected and applied to a particular question, new rules can be plausibly invented, and rules may be applied to the subtle facts of a given question. Thus, some part of law teaching is the promotion of memory of specific rules, and some part is the encouragement of new ideas related to those rules.

Given the reality that some students desire to avoid effort or to limit their efforts to no more than those calculated to prepare for evaluation, the professor must encourage a work ethic designed to accomplish the more essential ends. The goal in common to both professor and student is the student's exercise of memory, analysis, and imagination in employing the tools of law.

To realize this end, the law teacher must both instruct a student in class and guide the student's use of time outside class. In both settings, and through a host of means, the teacher directs the students to accomplish this task in three steps:

(1) The student learns some body of law, either as historical rules or as reasons for decisions applied in resolving historical disputes;

(2) The student organizes this body of law into a scheme based on the relationships and distinctions among the applications and reasons;

(3) The student applies this body of law to a new situation, using the organization to pick the rules best suited to resolve the situation.⁵

Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

5. One component of the last step is nearly an additional step, in which the "best suited" rule is assayed by selected criteria of justice or utility or fairness, which may have been learned in the second step. Even so, these three steps are usually necessary to promote

Much in the materials below suggests that, at different times, the collective emphasis of legal educators has moved from one step to another. Thus, colonial and early federal teachers focused more upon the second step, and so treatises and copybooks were the norm. After the Civil War, concern shifted to the first step, leading to emphasis on cases and their criticism and thereby leading to the use, and abuse, of the casebook. Following the advent of legal realism, law teachers have paid increasingly more attention to the third step, leading to the popularity of the problem book and other approaches in which student involvement is more apparently necessary to ascertain the material's meaning. Still, preoccupation with one element has never led to complete disregard for the others. Instead, concern for one element has usually required incidental attention to the others.

Notably influencing these shifts of emphasis is the evolving conception of order. The lawyers who organized the legal materials were creatures of their age, at least so far as "order" had meaning in each age. The changing nature of this orderliness is particularly acute in the frequent description of the teaching of law as teaching "the science of law" and the changes of meaning represented by this description.

II. TREATISES, COMMENTARIES, AND THE MONOLOGUE LECTURE

American law has been peculiarly influenced by its English colonial origins, owing in part to the common law's inherent preoccupation with its history and in part to American respect for her founding.⁶ The simpler matter remains, however, that many concerns of the modern law school had predicates and parallels in earlier ages.

A. *Foundations of Colonial Study*

Law in the American colonies was English law, and to study law the American lawyer looked first to the English lawbook. These lawbooks initially came more often from the bar than from the academy.

The ancient universities in Oxford and Cambridge had been offering lectures in Roman and canon law, arguably, since Roger Vacarius lectured in twelfth-century Oxford and authored the first student text in England, the *Liber Pauperum*, a collection of extracts from the Emperor Justinian's Code and Digest.⁷ But as medieval universities remained preoccupied with

memory, analysis, and imagination in the law.

6. See William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts 1760-1830* (2d ed. 1994).

7. There is some dispute regarding the actual connection of Vacarius, a Lombard canon who taught at Canterbury, to the Oxonian monastic *studia* of St. Frideswide, although there seems to be no doubt that King Stephen banned Vacarius from lectures on continental law, although Vacarius certainly produced a book on Roman law for the use of impoverished

Roman law, instruction in the English common law devolved onto the Inns of Court, the organized colleges of barristers in London.⁸ Only in 1756, when Charles Viner's legacy endowed a chair for the lecture of the common law in Oxford, did instruction in the common law become a university-sanctioned enterprise.⁹

So it was that the collegiate instruction of common law in England was not long established by the time Americans began to do the same. The primary textual influences from Britain in colonial law were case reports and a handful of treatises, especially the venerable Coke's *Institutes* and, arriving shortly before the revolution, Blackstone's *Commentaries*.

B. Eighteenth Century Law Study: Three Examples

The education of three colonial law students—Joseph Story, James Kent, and John Marshall—fairly represents the teaching practices of the age. Although there were periods of instruction from a lawyer, occasionally alongside a few other students, the bulk of their studies were in solitude, reading and copying from English law books.

Joseph Story graduated from Harvard College in 1798 and began reading the law, first in the office of Samuel Sewell. Away for months at a time as a member of Congress, Sewell was not the most attentive teacher. Story found himself

left very much alone, and with no literary associate in my

students, and although this treatise was universally used in Oxford by 1195. See J.L. Barton, *The Study of Civil Law Before 1380*, in 1 *The History of the University of Oxford* 519, 523-24 (J.L. Catto ed., 1984); 1 William Blackstone, *Commentaries* *18-19; 2 William S. Holdsworth, *A History of English Law* 147-49 (Boston, Little Brown & Co., 1923); 1 Frederick Pollock & William Maitland, *The History of English Law Before the Time of Edward I* 118-119 (Cambridge, Cambridge University Press, 1903); R.W. Southern, *From Schools to University*, in 1 *History of the University of Oxford*, *supra*, at 2-10 (J.L. Catto ed., 1984); Peter Stein & Francis DeZuñeta, *The Teaching of Roman Law in England Around 1200* (1990); *The Liber Pauperum* of Vacarius, Preface (Francis Zulueta ed., Selden Society, 1927). Still, he is traditionally credited with being the first law lecturer in an English university town, just as the study of Justinian jurisprudence is generally credited as the impetus for the growth of European universities. See Cecil Headlam, *Oxford & Its Story* 67-70 (London, J.M. Dent & Co. 1904).

8. Dean Harno exaggerated when describing the Inns of Court as "without parallel in history." Harno, *supra* note 4, at 5. The College of the Faculty of Advocates of Scotland not only historically parallels the Inns in training litigators and promoting legal continuity and reform, but also boasts an illustrious history, meaningful to the American colonial era. While the English Inns never fully recovered from their dissolution during the Commonwealth, the seventeenth and eighteenth centuries saw a golden age of the writing and teaching of law and legal philosophy in Edinburgh. See David M. Walker, *The Scottish Legal System* 105, 437 (6th ed. 1993). Until recently, there has been little commentary on the Inns after the seventeenth century. This omission is partially remedied in David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730* (1990). For a brief discussion of instruction in the Inns, see the sources collected in Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Exams*, U.M.K.C. L. Rev. (forthcoming 1997) [hereinafter Sheppard, *Informal History*].

9. The first holder of this professorship, William Blackstone, was elected in 1753. H.C. Hawbury, *The Vinerian Chair and Legal Education* (1958).

native town. I was driven, therefore, back upon my own resources, and I not unfrequently devoted for months more than fourteen hours a day to study. . . . [with] no opportunity to ask for any explanation of difficulties, and no cheering encouragement to light up the dark and intricate paths of the law.¹⁰

Sewell did give Story assignments, first setting him to read Blackstone. The *Commentaries* led Story to question the applicability of the common law to America. Sewell encouraged this query in his correspondence, urging Story to acquire "a knowledge of the laws of your country," which would be built on a broad foundation, for which a student must

[e]xamine the theory & general doctrines & the origin of the municipal law, & descending from generals to particulars, to discover the partial applications & limits of the [English] system. In this last course you are engaged, & it is apparent that this must be the most scientific, & you need not fear that when you have the law of England as a system of political, moral & economic rules, you will find any difficulty in ascertaining the variations which our situation & difference of manners and general policy have required. . . . [turning from English to Massachusetts law] and in them you will discover all the local and positive variations of the general system. . . . You are to view then, Blackst[one] & other books which you will be put to read, as affording you tenets & doctrines of which some are directly and plainly applicable & of full obligation in this country as well as in England; rules and principles of indirect effect & other parts tho[ugh] inapplicable, abrogated or disused, have a logical utility, seeming to connect the system and thereby aiding the memory in retaining the parts of it which have been adopted & serving also in many instances to explain & harmonize them.¹¹

After Blackstone, Story was "hurried at once into the intricate, crabbed, and obsolete learning of Coke on Littleton,"¹² a task he found, initially, overwhelming. "I took it up, and after trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped upon the book, and stained its pages."¹³ Only through tenacity did he begin "to see daylight, ay and to feel that I could comprehend and reason upon the text and the comments. . . . The critical period was passed; I no longer

10. Joseph Story, *Autobiography*, in *The Miscellaneous Writings of Joseph Story* 1, 18 (William W. Story ed., Boston, Little, Brown & Co. 1852) [hereinafter Story, *Autobiography*].

11. Letter from Samuel Sewell to Joseph Story (Feb. 12, 1799), in James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* 14 (1971).

12. Story *Autobiography*, *supra* note 10, at 19.

13. *Id.* at 20.

hesitated."¹⁴

He turned then to the King's Bench reports, particularly those of Edmund Saunders, from which he took a love of reporting, and to Fearn's treatise, *Contingent Remainders and Executory Devises*, which he condensed into a "manuscript abstract of all its principles."¹⁵ This monasticism under Sewell was at last followed by a chance, during the few months that Story worked for Samuel Putnam, to talk about the law in his studies. Putnam later recalled, "He read much yet we talked more, and I believe in my heart, that even then, he did the greater part of it."¹⁶

James Kent began studying law as a fifteen-year old, enrolling briefly in Ezra Stiles's courses at Yale, before the college was dispersed to evade British soldiers during the Revolution.¹⁷ Over a summer's exile, Kent found a copy of Blackstone in a country village, which he read while waiting to re-enter college.¹⁸ In 1781 after Kent graduated from Yale, he entered the law office of Attorney General Egbert Benson in Poughkeepsie, New York. His education there was based in part on work with fellow students in the office and in part on copying books at the farmhouse where he boarded.¹⁹ He copied long passages from Grotius and Puffendorf, and "abridged Hales [sic] history of the common law, and the old books of practice, and read parts of Blackstone again & again."²⁰ After his admission to the bar in 1785, Kent continued his own schooling. He devoted his day to Greek and Latin in the morning, law practice and business in the afternoon, and French and English in the evening. From 1788 to 1789, his evening readings included Coke's commentary on Littleton.²¹

Unlike Story, Kent, and the mass of colonial students, John Marshall not only privately studied Blackstone before the Revolution,²² but also during a Revolutionary lull in the summer of 1780, studied in the academic cloister at the College of William and Mary. There he read under George Wythe, the newly installed Professor of Law and Police. Not that the benefit was as great as tradition suggests: the course lasted only a few months.²³ Still, Marshall found the school agreeable, both because of its

14. *Id.*

15. *Id.*

16. R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 43 (1985) (quoting Letter from Samuel Putnam to William W. Story (May 28, 1846)).

17. A rather dramatic but well-documented summary of Kent's Yale years is in John Theodore Horton, *James Kent: A Study in Conservatism, 1763-1847*, at 3-13 (1939).

18. See Letter from James Kent to Thomas Washington (Oct. 6, 1828), in 1 *Select Essays in Anglo-American History* 837, 838 (American Association of Law Schools ed., 1907) [hereinafter, *Select Essays*].

19. See *id.*

20. *Id.* at 837-38.

21. See *id.* at 839-40.

22. See John Marshall, *An Autobiographical Sketch* by John Marshall 6 (John Stokes Adams ed., 1937) [hereinafter *Marshall, Autobiography*].

23. There is some controversy as to how long Marshall studied in Williamsburg.

democratic manner (students needed not wear shoes or coats in warm weather) and its proximity to his fiancé in Yorktown, twelve miles away. Wythe's law program included a mock assembly, which functioned according to the rules of Parliament, as well as a monthly moot court and twice-weekly lectures.²⁴ The lectures were more likely concerned with political theory than the black-letter law, and Marshall also took detailed "commonplace" notes. These consisted of a typical index of entries forming a home-made law dictionary with illustrations of doctrines from cases. Marshall redacted his notes from a 1769 abridgement of Virginia statutes, Blackstone's *Commentaries*, Matthew Bacon's *Abridgement*, and a host of reports and treatises. All of these he arranged alphabetically into topics, beginning with entries on "abatement" and continuing through "libel."²⁵

The notes are thorough, if liberally sprinkled with marginalia repeating the name, "Polly Ambler," his soon-to-be wife.²⁶ From these notes, the effect of Judge Wythe's lectures on Marshall's recordings of the law does not appear to be overwhelming: Polly notwithstanding, the commonplace notes reflect very little that scholars have not attributed to published sources,²⁷ and the completion of the already brief course of lectures was neither a sufficient desiderata to outweigh marriage nor a requirement for licensure.²⁸ Marshall was admitted to practice the year he left William and Mary.²⁹

The commonplace books written by all three students drew from their readings of cases, topical treatises, and the general abridgements of law. None of these sources, however, were so influential in the particular or instructive in the whole as were the writings of the two great generalists, Coke and Blackstone.

C. Coke's and, of Course, Blackstone's Books

Despite the constant complaints that students raised against Coke's comments on Littleton, Edward Coke's *First Institute of the Laws of England* was, for over a century, the most accepted student text.³⁰ The *Institutes*

Marshall's biographer Albert Beveridge believed it was six weeks. See 1 Albert J. Beveridge, *The Life of John Marshall* 154 (1916). Other evidence, including Marshall's own autobiography, suggests as long as three months. See Marshall *Autobiography*, *supra* note 22; Charles Cullen, *New Light on John Marshall's Legal Education and Admission to the Bar*, 16 Am. J. Legal Hist. 345, 348 (1972).

24. See Beveridge, *supra* note 23, at 155-60.

25. See John Marshall, *Law Notes*, in 1 *The Papers of John Marshall* 40, 45 (Herbert A. Johnson ed., 1974) [hereinafter Marshall, *Papers*].

26. *Id.* at 45-87.

27. See William F. Swindler, *John Marshall's Preparation for the Bar—Some Observations on his Law Notes*, 11 Am. J. Legal Hist. 207 (1967).

28. See Marshall, *Papers*, *supra* note 25, at 37-41; Cullen, *supra* note 23, at 345.

29. See Marshall, *Autobiography*, *supra* note 21, at 6.

30. Edward Coke, *The First Part of the Institutes of the Laws of England; or A Commentary upon Littleton, Not the Name of a Lawyer only, but of the Law Itself* (London,

succeeded partly because Coke wrote them primarily in English, rather than exclusively in Law French and Latin. Coke's long-lived success, however was not for choice of tongue alone; there were other law books in English.³¹ Rather, Coke's *First Institutes* was extraordinarily complete and succinct, and it long held first position as the textbook of the common law.³²

Coke, famously, was a jurist, not an academic. As Chief Justice of the King's Bench, he wrangled with James I, arguing that the King's prerogative and the Chancellor's writ did not extend to common-law cases. Instead, he asserted that they were governed by the "artificial logic of the law."³³ This position led, along with a tad of political intrigue and a few slights of protocol, to his dismissal in 1616.³⁴ Coke's earliest writings were small treatises on bail, copyholding, and pleadings, and in 1600, he began to publish his *Reports*.³⁵ In 1627 at the age of seventy-five, Coke embarked on a systematic discussion of the common law, beginning with a gloss, or

Society of Stationers 5th ed. 1656) [hereinafter, *First Institute*].

31. Indeed, in 1651 John Cowell's *Institutiones Juris Anglicani ad methodum institutionum Justiniani*, published in 1605, was translated into English by order of Parliament. The "Rump" Parliament ordered numerous Latin and French texts translated into English. See Daniel R. Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607*, 61 B.U. L. Rev. 1, 71-76 (1981).

32. Although Blackstone was the first lecturer in Oxford to pursue a course dedicated to the common law, Thomas Wood, author of the 1720 *Institutes of the Laws of England*, had argued for such lectures in 1708, based mainly on Coke's works. Thomas Wood, *Some Thoughts Concerning the Study of the Laws of England in the Two Universities*, in *The Gladsome Light of Jurisprudence* 34 (Michael H. Hoeflich ed., 1988).

33. *Prohibitions del Roy*, 77 Eng. Rep. 1342-43 (1608).

34. See *id.*; see also Catherine D. Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* 297-306 (1957) (discussing Coke's view of government which differed with his superiors); I John, Lord Campbell, *Lives of the Chief Justices of England* 284 (Jersey City, Linn & Co. 1881) (describing events which ultimately led to the removal of Coke as Chief Justice); Hastings Lyon & Herman Block, *Edward Coke: Oracle of the Law* 198-208 (1929) (describing actions by Coke which led to his dismissal from the King's Bench); Humphry W. Woolrych, *The Life of the Right Honourable Sir Edward Coke, Knt.* 80-128 (South Hackensack, Rothman Reprints, Inc. 1972) (1826) (providing a sympathetic account of his chief justiceship). One of the causes of regal concern, found after some investigation by Coke's opponents, was that Coke had allowed his coachman to ride without a hat. Coke remained sporadically active in Parliament following his dismissal, leading the opposition in 1620, and among his last official acts was support of the Petition of Right of 1628. A fine recount of Coke's contributions to the Petitions debate, particularly his opposition to hobbling amendments, is in Stephen D. White, *Sir Edward Coke and the Grievances of the Commonwealth, 1621-1628* (1979), particularly chapter seven. Even so, this century's most significant study of Coke's life and contributions to the law will almost certainly be that now being written by Allen Boyer for Stanford Press.

35. *Edward Coke, Les Reports de Edward Coke, Jades Chiefe Justice de Bank le Roy* (London, John Streater 1672) (1600-1615). The reports were initially in Law French, with an English translation. *Edward Coke, The Reports of Sir Edward Coke, Late Lord Chief-Justice of England* (London, W. Lee, M. Walbanck 1658). The published reports were only a portion of the case reportage that Coke compiled between 1579 and 1616. See J.H. Baker, *Coke's Notebooks and the Sources of His Reports*, 30 Cambridge L.J. 59 (1972).

commentary, on Sir Thomas Littleton's *Tenures*.³⁶ *Tenures* is a fifteenth-century treatise examining land tenures as construed in Year Book cases, which may be the earliest printed book on the English common law.³⁷ Coke had studied Littleton for years, referring to him in the *Reports* and occasionally defending him against critics.³⁸

The whole of Coke's *Institutes* runs to four thick books, the last three of which generally discuss legal instruments and constitutional arguments for limiting the powers of the crown, criminal law, and the jurisdiction of courts.³⁹ The *Institutes* were, almost certainly, the first books that had enduring effect in English or American constitutional study.

Coke on Littleton is the hybrid product of two writers, working across a gulf of two centuries. Moreover, their projects were altogether different in scope. Littleton restricted his study to the rules of land tenures, but Coke's work was much broader, and sought the *ratio* of the law, for "if by your study and industry, you make not the reason of the law your own, it will not remain long in your memory."⁴⁰ The result is a rich but confusing trove of writings. It is filled with allusions to cases and obscure maxims in a variety of languages, as well as tangential scholarly enquiries dropped among fundamental points of law, and sprinkled throughout with homiletic statements. There is a slight ration of anachronistic and imaginative blunders, but the scholarship is generally sound.⁴¹ In truth, the amalgam of the rich strains of scholarship on a host of matters is Coke's hallmark, even if the references are not all as clear as the reader might wish. The reader who first approaches *Coke on Littleton* without a well-stocked library for assistance embarks upon a truly formidable task.⁴²

36. Thomas Littleton, *Tenures* (London, Lettoun & Machlinia, 1481). Eugene Wambaugh, discussed below, reprinted a copy of Littleton in 1903. Littleton's *Tenures* in English (Eugene Wambaugh ed., 1903).

37. See Frederick C. Hicks, *Men and Books Famous in the Law* 86 (1921); David M. Walker, *The Oxford Companion to Law* 772 (1980). Of course, earlier books on English law existed, notably de Glanville's *Treatise* written circa 1188, Bracton's *Tractatus*, circa 1250, Britton, as well as the *Speculum Justiciariorum*, circa 1290, and Fortescue's *De Laudibus Legum Angliae*, of about 1466, but these were manuscripts produced before the arrival of the printing press. For some of the reasons why Littleton's treatise was so hard to emulate, see A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 634-41 (1981).

38. See Hicks, *supra* note 37, at 91-95.

39. See Edward Coke, *The Second Part of the Institutes of the Lawes of England, Containing the Exposition of Many Ancient, and Other Statutes* (London, M. Flesher, R. Young 1642) [hereinafter Coke, *Second Institute*]; Edward Coke, *The Third Part of the Institutes of the Lawes of England, Concerning High Treason and Other Pleas of the Crown, and Criminal Causes* (London, M. Flesher, R. Young 1642) [hereinafter Coke, *Third Institute*]; Edward Coke, *The Fourth Part of the Institutes of the Lawes of England: Concerning the Jurisdiction of the Courts* (London, M. Flesher 1644) [hereinafter Coke, *Fourth Institute*]. The second, third, and fourth *Institutes* were published posthumously by Parliamentary decree.

40. Coke, *First Institute*, *supra* note 30, § 394(b).

41. Samuel Thorne gives a sympathetic but clear-eyed appraisal of Coke's scholarship in the inaugural Selden Society Lecture. Samuel E. Thorne, *Sir Edward Coke 1552-1952* (1957).

42. The modern reader is aided considerably, however, by the recent reproduction of a

The difficulty of that task was a rite of passage for most early-American law students. It was a tedious affair, leading even a scholarly young Jefferson to send Coke to the Devil,⁴³ but its potential rewards were great, as when Joseph Story, upon conquering its mysteries, noted, "When I had completed the reading of this most formidable work, I felt I breathed a purer air, and that I had acquired a new power."⁴⁴ Nonetheless, the more common view was that of Daniel Webster, who resented the practice of assigning students to read such a sophisticated book. For an untutored boy of twenty to be set such an author, he said, was "folly."⁴⁵

Student labors with *Coke on Littleton* were soon eased, in part because of new editions that reordered the text along Matthew Hale's more classical syllabus,⁴⁶ and in part because of another product of Hale's analytical tradition, Blackstone's *Commentaries*. The *Commentaries* almost immediately began to displace Coke from its pinnacle on their American publication. By 1810 a guide for students in law offices suggested that perusing Coke's "immethodological farago" was already a task "too often neglected."⁴⁷

well-annotated 1824 edition, along with superb modern notes by Professor Thomas Barnes. Edwardo Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton, Not the Name of a Lawyer only, but of the Law Itself* (Thomas Barnes, ed., Legal Classics Library 1985) (1656).

43. On Christmas Day 1762, Jefferson wrote his friend John Page of a number of minor disasters that had befallen him and of the feminine distractions that preoccupied him

too often, I am sure, to get through old Coke this winter; for God knows I have not seen him since I packed him up in my trunk in Williamsburg. Well, Page, I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life. What! Are there so few inquietudes tacked to this momentary life of ours, that we must be loading ourselves with a thousand more?

Letter from Thomas Jefferson to John Page (Dec. 25, 1762), in 4 *The Writings of Thomas Jefferson* 1 (Albert Ellery Bergh ed., Washington, D.C., Thomas Jefferson Memorial Association 1905) [hereinafter *Jefferson Writings*].

44. Story, *Autobiography*, *supra* note 10, at 20.

45. According to Webster:

There are propositions in Coke so abstract, and distinctions so nice, and doctrines embracing so many distinctions and qualifications, that it requires an effort not only of a mature mind, but of a mind both strong and mature, to understand him. Why disgust and discourage a young man by telling him he must break into his profession through such a wall as this?

1 *The Works of Daniel Webster* xxviii (Edward Everett ed., 1974). The biographer went on to describe Webster's preference for the study of titles of law "of greater importance in this country than the curious learning of tenures, many of which are antiquated, even in England." *Id.*

46. See J.H. Thomas, *Systematic Arrangement of Lord Coke's First Institute of the Laws of England* (1836) (3 vols.). Hale's book was more deliberately based upon the outlines of the Roman law masterpiece, the *Institutes of Justinian*. See Thomas Collett Sandars, *The Institutes of Justinian; with English Introduction, Translation, and Notes* (7th ed., 1941). While Coke's whole *Institutes* is also clearly patterned on Justinian, this influence is weakest in the only volume to find fame or wide circulation, which was based on Littleton.

47. *A General Course of Preparatory Study for the Duties of the Bar by Counsellor at Law of the City of New York* (New York, S. Gould 1810).

Serendipity brought William Blackstone to offer his lectures on the common law. Despite his prominence as a law lecturer for eight years in All Souls College, he was rejected by the patron of the ancient position of Regius Professor of civil (or classical Roman) law.⁴⁸ Thus barred from promotion to teaching the more elite civil law, Blackstone began unsanctioned lectures on the academically disregarded English common law. He began to outline the common law in his annual syllabi, *An Analysis of the Laws of England*,⁴⁹ which he then refined and delivered as the first holder of the chair newly endowed by Charles Viner's bequest of the copyright to his *General Abridgment of Law and Equity*.⁵⁰

Thus, in 1758 Blackstone set out to deliver, as Vinerian Professor, a complete set of lectures that echoed his thwarted purpose of teaching the science of civil law. This he described as a "[s]cience . . . to be cultivated, methodized, and explained in a course of academical lectures" which would construct English law and constitution into "a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides."⁵¹ For four years, he not only delivered the lectures but polished the four resulting volumes into his *Commentaries on the Laws of England*. These were printed in successive years, from 1765, at the Clarendon Press in Oxford University.⁵²

48. See James Clitherow, Preface to William Blackstone, Reports of Cases Determined in the Several Courts of Westminster-Hall, from 1746 to 1779 (London, S. Sweet et al. 2d ed., 1828). Lord Campbell relates the interview between Blackstone and the Duke of Newcastle, who passed over Blackstone for the talentless, but politically reliable, Dr. Jenner. Campbell, *supra* note 34, at 378-79.

49. William Blackstone, *Analysis of the Laws of England* (London, J. Sharpe 1821) (1756). Blackstone published a preliminary analysis based on his lectures for those who attended his classes in 1756, 1757, and 1758. William Blake Odgers, *Sir William Blackstone*, 27 Yale L.J. 599, 605 (1918).

50. Viner's immense project was an unwieldy, 23-volume "encyclopedia of legal lore," on which Viner labored for nine years. The value of the bequest, which included other property, was about £12,000 and was to support not only a chair, but other scholars as well. Indeed, Blackstone resigned the chair in 1766 when the university convocation refused to adopt his scheme of creating a school of English law in New Inn Hall, of which he was then principal. See William Blake Odgers, *Sir William Blackstone*, 28 Yale L.J. 542 (1918); Odgers, *supra* note 49, at 610-12.

51. William Blackstone, *A Discourse on the Study of Law* (1758) in 1 William Blackstone, *Commentaries on the Laws of England* (1765-69 Facsimile edition, Univ. of Chicago Press, 1979). There seems to be a clear effort in Blackstone's writing to relate this "scientific" view of the common law to the contemporary description of the civil law as a "science," a label it had held from its Roman roots. See generally Tony Honoré, *Ulpian* (1982). Certainly, the *Commentaries* follow the structure then long-associated with the Code of Justinian. See generally Sandars, *supra* note 46. For a contrast between the scientific and the mysterious in Blackstone's work, see Daniel Boorstin's classic essay, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1996). John Langbein emphasizes the point that a critical influence in Blackstone's great clarity is that his work comes at the end of the worst confusions of the writ system, allowing a more substantial set of categories. Telephone Conversation with John Langbein (Nov. 18, 1996).

52. See Stanley N. Katz, *Introduction*, in 1 Blackstone, *Commentaries on the Laws of England*; *supra* note 51. That Clarendon Press published his *Commentaries* was all the more

The books were well received, even earning an uncharacteristically strong review from Edmund Burke's *Annual Register*, which noted that formerly "the law has been looked on, as the most disagreeable of all studies; and of so dry, disgusting, heavy a nature, that students of vivacity and genius were deterred from entering into it," but that Blackstone "has entirely cleared the law of England from the rubbish in which it was buried."⁵³

Lord Mansfield recommended the *Commentaries* as a replacement for *Coke on Littleton*:

Till of late I could never with any satisfaction to myself answer such a question [(recommending what books a young man should read for the bar)]; but since the publication of Mr. Blackstone's *Commentaries*, I can never be at a loss. There your son will find analytical reasoning, diffused into a pleasing and perspicuous style. There he may inhale imperceptibly the first principles on which our excellent laws are founded; and there he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disgusted and disheartened many a Tyro, but who cannot fail to please in the modern attire in which he is now decked.⁵⁴

The *Commentaries* were an immediate success in America. Robert Bell, a Philadelphia printer, sold subscriptions for fifteen hundred copies throughout America, even though Americans had already bought more than one thousand copies of English editions.⁵⁵ Still, Blackstone's own editions were not the sole basis for his enduring fame and influence on American legal education. For the next five decades, scores of annotated *Commentaries* poured forth.⁵⁶ Various authors

natural as Blackstone had been a delegate to the press for several years, instituting reforms in its management. Odgers, *supra* note 49, at 605.

53. Albert V. Dicey, *Blackstone's Commentaries*, 4 Cambridge L.J. 286, 286 (1932) (quoting *Annual Register*, 1767).

54. Dicey, *supra* note 53, at 287 (quoting Lord Mansfield). The *Commentaries* would not long remain so popular in England. Dicey sets out John Austin's influential criticisms of 1826, that Blackstone was more apologist than anything else, adopting numerous errors, having "swallowed the matter of his reading, without choice and without rumination." *Id.* Austin's criticisms echo Jeremy Bentham's, first published in *A Fragment on Government* in 1776. See Jeremy Bentham, *A Fragment on Government* (J.H. Burns & H.L.A. Hart eds, 1990). But see Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & Econ. 569 (1976), a view of Blackstone's contributions shared by Harold J. Berman & Charles J. Reid, *The Transformation of Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437 (1996).

55. See William Blackstone, *Commentaries on the Laws of England* (Philadelphia, R. Bell 1771). I am indebted to Whitney Bagnall at the Columbia Law Library for her descriptions of her ongoing research into the disposition of the various orders on Bell's subscription list.

56. Dr. Lockmiller and those who have followed him may somewhat underrepresent the number of English printings as "at least twenty-one," in part because Dr. Lockmiller relied almost exclusively on Dean William Hammond's bibliographic survey, which ends in 1844. Compare David Lockmiller, *Sir William Blackstone* 157 n.41 (1938) (delineating the books as published from the first in 1765 to the twenty-first in 1844), with Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731, 736

annotated Blackstone's original text with the newly written law of England and, more particularly, of the American courts.⁵⁷ As if this were not enough, in America, Dane, Kent, and Story, and in England, Henry John Stephen, among others, conscientiously built their own commentaries and abridgements upon Blackstone's foundation.⁵⁸

Blackstone's outline is derived in part from that of Matthew Hale's 1716 *The Analysis of the Law*, on which Blackstone had also modeled his syllabus.⁵⁹ The *Commentaries* are organized into four interdependent books, considering the rights of persons, the rights of things, private wrongs, and public wrongs.⁶⁰ The sections are broken into subheadings, each considering some particular subject in detail with surprisingly clear and readable prose. The sum of the work is so comprehensive that one might imagine there was little law left undescribed.⁶¹ While the writing is liberally punctuated with Latin maxims, these are sufficiently rare that a

n.34 (1976) (stating that twenty-one editions were published in England, twelve in the United States, three in Ireland, and other foreign translations), with William G. Hammond, *Bibliography of the Commentaries*, in William Blackstone, *Commentaries on the Laws of England* xxi-xxv (San Francisco, Bancroft-Whitney Co., William G. Hammond ed., 1890). But Dean Hammond did not consider later English editions, such as Maxwell's various printings. *Id.* See William Blackstone, *Commentaries on the Laws of England* (Herbert Broom & Edward Hadley eds., London, W. Maxwell 1869).

57. Of the many American editions of Blackstone, three seem to have had the greatest academic influence: St. George Tucker's in 1803, Sharswood's in 1859, and Cooley's in 1870. There were of course many other editions, some specifically meant for use in particular schools, such as the one George Chase edited in 1890 for use at Columbia. See Lockmiller, *supra* note 56, at 171 n.7; Nolan, *supra* note 56, at 761-64. The Lawbook Exchange has recently issued a facsimile of St. George Tucker's edition. Blackstone's *Commentaries: With Notes of Reference to the Constitution and Cases of the Federal Government of the United States and of the Commonwealth of Virginia* (Paul Finkelman & David Cobin eds., 1996) (1803).

58. See Henry J. Stephen, *New Commentaries on the Laws of England* (New York, Halsted & Voorhies, 1st Am. ed. 1841) (London, Butterworths, 8th English ed. 1880) (relying partially upon Blackstone). The remaining works are discussed below.

59. See Lockmiller, *supra* note 56, at 42. Compare at *id.* app. V, at 253-59, with *id.* app. V, at 260-64, and references in n.18.

60. Lockmiller reprints Blackstone's outline at Lockmiller, *supra* note 56, app. V, at 253-59. The classical influence of Hale, already noted, largely accounts for Blackstone's four essential topics and their order. See Thomas G. Barnes, *Notes From the Editors*, *Commentaries on the Laws of England* 16-24 (1994).

61. Jefferson noted his respect but typical criticism of Blackstone in 1812:

Blackstone . . . although the most elegant and digested of our law catalogs, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of the law. The distinction between these, and those who have drawn their stores from the deep and rich mines of Coke and Littleton, seems well understood even by the unlettered common people, who apply the appellation of Blackstone lawyers to these ephemeral insects of the law.

Letter from Thomas Jefferson to John Tyler (June 17, 1812), 13 *Jefferson Writings*, *supra* note 43, at 165, 166-67. This seemingly perfect comprehensiveness was integral to Blackstone's efforts to systematize a "science of the law." See Berman & Reid, *supra* note 54.

reader lacking in the classics might have skipped them or guessed at them without too great a loss of comprehension. The text is sparingly annotated with references to *Coke on Littleton*, *Littleton's Tenures*, Bracton, and other writers as well as to statutes and opinions. Cases are rarely discussed in the text and, when they are, they serve essentially as illustrations rather than as sources of law.⁶² Reading Blackstone in the late twentieth century is a bit like reading a current treatise; one is left with a reasonably, but not overly, detailed understanding of a host of related legal doctrines and their applications.

Even this brief description of Coke's and Blackstone's works requires a glimpse of their politics. Surely, much of Coke's life and writings were devoted to championing the law as a limit on the arbitrary acts of King and council.⁶³ The *First Institute* has a predictably strong Whiggish overtone, protecting the jurisdiction of the courts and defending precedent from Parliamentary assault. In contrast, Blackstone presented a much more central role for the King and Parliament, even if this role is limited by the rights of citizens.

These biases tended to make the books into subtle mechanisms for political indoctrination. Jefferson complained of the ascendancy of Blackstone, and sought to have the legal instruction at the University of Virginia in a less Tory flavor.⁶⁴ On the other hand, Blackstone's influence may have fueled more Whiggish fervor than the often-partisan Jefferson was prepared to concede.⁶⁵

62. See, e.g., 2 William Blackstone, *Commentaries* *143 (discussing a case establishing a lease as for a term of years).

63. See Glenn Burgess, *Absolute Monarchy and the Stuart Constitution 152-57* (1996); R.A. MacKay, *Coke—Parliamentary Supremacy or the Supremacy of the Law?*, 22 Mich. L. Rev. 215 (1923); Ruth Mertz, *Sir Edward Coke in the Parliament of 1621* (1942) (unpublished Ph.D. dissertation, Washington University Dept. of History). Although, just as surely, much of his career, particularly his term as Solicitor General, was spent in slavish devotion to the increased prerogative of the crown. Woolrych, *supra* note 34, at 50-74.

64. Jefferson wrote:

In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke on Littleton was the universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember that our lawyers were then all Whigs. But learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be Whigs, because they no longer know what Whigism or republicanism means. It is in our seminary that that vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister States.

Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in 16 *Jefferson Writings*, *supra* note 43, at 155.

65. See Beverly Zweiben Rowsome, *How Blackstone Lost the Colonies* (1990). More recently, deeper ideological criticism has been echoed by Duncan Kennedy. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979). Other works

In any event, the principles of law selected and presented by both authors surely had a real influence in the political ideals of students who absorbed them, and this nascent idealism was known to those who chose the works for student reading. Blackstone's American influence was long-lived. In the 1893 census of law schools performed by the American Bar Association and the U.S. Bureau of Education, twenty-six schools reported assigning Blackstone in their mandatory curricula.⁶⁸

D. *The Lectures of Litchfield*

The first American *school* of law,⁶⁹ organized strictly to prepare students to be lawyers, and distinct from a general bachelor's degree course, was initially an overflow of students in Judge Tapping Reeve's law office in the quiet, backwater village of Litchfield, Connecticut.⁶⁸ Reeve served for sixteen years on the state supreme court and was well-regarded as a lawyer, even if he was prone to be a tad absent-minded.⁶⁹ Judge Reeve's first student was his bother-in-law, Aaron Burr, who began study with Reeve in 1775.⁷⁰ To instruct the young pupil, and the others who soon followed him, Judge Reeve began organizing instructional material into lecture notes, which he had somewhat standardized by 1782.⁷¹

have considerably outshone and strongly criticized Kennedy's ahistorical work. See John W. Cairns, *Blackstone, an English Institutionalist: Legal Literature and the Rise of the Nation State*, 4 Oxford J. Legal Stud. 318 (1984); Alan Watson, *The Structure of Blackstone's Commentaries*, 97 Yale L.J. 795 (1988). Watson examined the resonances and dissonances between Blackstone's *Commentaries* and *Justinian's Institutes* and concluded that the civilian influence in Blackstone's work was strong, but that it is difficult to conclude he had a "particular and precise political ideological motivation." *Id.* at 810-12. Such a conclusion, of course, does not refute Kennedy's argument of Blackstone's ideology, even if it does deny its claims of Blackstone's intent. A more detailed consideration of the political influence in the early Republic is in Paul D. Carrington, *Legal Education for the People's Populism and Civic Virtue*, 43 U. Kan. L. Rev. 1 (1994).

66. Only half of the schools surveyed reported titles of assigned books. Of those that did, Alabama, Columbian (D.C.), Cornell, DePaul, Emory, Georgetown, Georgia, Hastings, Howard, Illinois Wesleyan, Iowa College of Law, Kansas, Louisville, McKedree (Ill.), Michigan, Mississippi, North Carolina, Northwestern, Oregon, South Carolina, Texas, Tulane, Virginia, Washington and Lee, West Virginia, and Willamette (Or.) reported assigning at least one volume of Blackstone (usually that edited by William G. Hammond). U.S. Bureau of Education, Report on Legal Education 44-62 (Washington D.C., Government Printing Office 1893).

67. Emphasis on the nature of a "school of law" is meant strictly to deflect loyalists of other claimants to such a title, according to differing definitions.

68. See Lawrence M. Friedman, *A History of American Law* 319 (2d ed. 1985). The isolated character of the town was later credited as one reason for the school's enormous success as a training center. *The Litchfield Law School*, 20 Albany L.J. 72, 73 (1879).

69. Reeve would sometimes fail to notice that his horse slipped its bridle, leaving Reeve dragging the empty leather in the dirt behind. See Marian C. McKenna, *Tapping Reeve and The Litchfield Law School* 160 (1986).

70. See Samuel H. Fisher, *The Litchfield Law School*, address delivered at the Tapping Reeve House, Before the Litchfield Historical Society, Aug. 29, 1930 (Harvard pamphlet US 907 CON FIS).

71. McKenna, *supra* note 69, at 60.

The school was a great success, growing to fifty-five enrollees by 1813 before its decline a decade later. It had over a thousand graduates, many of whom were drawn from the social elite and led the young republic, including three U.S. Supreme Court members, fifty-six state supreme court judges, twenty-eight Senators, one hundred and one Congressmen, fourteen governors, six U.S. cabinet members, and eight professors, not counting educator Horace Mann.⁷² Still, the school closed not long after the death of its founder, and the illness of his successor left it unable to compete with the newly opened law programs at Harvard, Columbia, Yale, and the other universities.

The course lasted fourteen months, including two one-month holidays.⁷³ Judge Reeve initially gave the lectures alone, although one of his students, James Gould, joined him as a lecturer in 1798, and ultimately became sole proprietor of the school.⁷⁴

The Litchfield lectures established the framework for instruction in the professional law school. They ran the gamut of American private law and were eventually grouped into forty-eight distinct titles. The course was rooted in the practicalities of the common law governing private disputes, skipping public law topics of Constitutional government and politics, Roman civil law, and "stately lectures on the great principles of the Laws of Nature."⁷⁵ Instead, lectures included master and servant, actions for debt, evidence, trials, insurance, partnership, and the like.⁷⁶

Lectures covered one topic at a time and described a pattern of principles punctuated by citations to cases and commentaries, occasionally referring to the facts of a given case.⁷⁷ Daily lectures lasted an hour and a half, during which students took notes for later transcription.⁷⁸ The

72. *Id.* at xvi, 175.

73. *See id.* at 63.

74. Gould later became a judge of the Connecticut Supreme Court of Errors. *See Reed, supra* note 4, at 130.

75. *See McKenna, supra* note 69, at xvi. This framework, of course, has some similarity to that of the more liberal university approach, but remained distinct for some time during their mutual developments. *See* note 88 below.

76. For a full list of subjects, *see id.* at 64 (reprinting Theodore D. Woolsey, *Historical Discourse at the Semi-Centennial of the Yale Law School* 8 (New Haven, 1874)). That Reeve's interests are to advise the practicing lawyer is clearly seen in his writings, such as *Tapping Reeve, The Law of Baron and Femme* (Albany, W. Gould & Son, 3d ed., 1862), although his contributions to law reform are part and parcel of such projects. *See Tapping Reeve, A Treatise on the Law of Descents* (New York, Collins & Hannay, 1825) [hereinafter *Reeve, Descents*] (employing uniform meanings for terms in various state's descent statutes).

77. *See* Lonson Nash, *Tapping Reeve's Lectures on Various Legal Subjects* (1803) (unpublished manuscript, Harvard Law Library no. MS 2011) ; C[aleb] Stark Jr., *Lectures upon Law by Hon. James Gould, Litchfield Con., 1824*, at 566 (unpublished manuscript, Harvard Law Library no. 2016).

78. According to one student:

The lectures were taken in the following way. By an abbreviation of each word, I followed the lecturer in the lecture as he delivered it, and afterwards copied the lecture in full at my own room. So . . . I got in this way a very good transcript of the

students also used their notebooks for commonplace copying from treatises, with each week's work examined every Saturday morning.⁷⁹

Both Reeve and Gould dictated detailed notes in treatise-like fashion. They would generally begin each topic with an overview of the scope of the topic and its general role in law, followed by an issue-by-issue treatment. They addressed each topic in general terms and punctuated their disquisitions with frequent references to Blackstone, Hale, and Coke, and the authors of topically more narrow treatises, making less frequent references to cases and statutes to guide the students' outside reading along with the lecture topic. The text of the lectures was essentially a narrative of the principles involved, although some topics were illustrated by brief discussions from cases.⁸⁰ They added case citations as string cites for later student review to illustrate particular points, and frequently referred to cases with very brief mention of their facts and a terse summary of their holdings.⁸¹

The lectures were given slowly, with deliberate repetition, "The practice of Judge Gould was to read the principles from his own [manuscripts] twice distinctly, pausing between, and repeating in the same manner the leading cases."⁸² Gould sat on a huge, old-fashioned chair on a dias at the front of the room, from which he lectured each morning, beginning at nine o'clock, and where, students said, he "quaffs ice brandy in the afternoon."⁸³ Gould, particularly, employed venerable techniques of legal illustration, particularly the use of Blackacre and Whiteacre as illustrations,⁸⁴ a technique at least as old as the writings of Francis Bacon.⁸⁵ The systematic nature of the lectures became, in the end,

lecture. I would suggest this mode to the law students at Cambridge.

Letter from William S. Andrews to Emory Washburn, in *Lectures Upon the Various Branches of Law by Messrs. Reeves & Gould At the Law School in Litchfield Connecticut Taken in 1812-1813* (unpublished manuscript, Harvard Law Library no. 2010). Andrews was a graduate of Harvard College in 1812; his dedicatory note declares, "Presented to the Law School at Cambridge Oct. 12, 1859, through the Hon. Emory Washburn Professor at the Law School by William S. Andrews, with his respect. The current price for a set of these Lectures at Litchfield was \$100." A transcription of Yale Law School's copy of Aaron Burr Reeve's notebook is currently being produced by Tracy Thompson. Telephone conversation with John Langbein (Nov. 8, 1996).

79. See Reed, *supra* note 4, at 41.

80. See *Contracts* by J. Gould, Esq. (unpublished manuscript, Harvard Law Library no. 2138).

81. See James Gould, *Of Agreements between Husband and Wife*, in James Gould, *Lectures 1824* (unpublished manuscript, Harvard Law Library no. MS 2015).

82. McKenna, *supra* note 69, at 166-67.

83. *Id.* at 170-71 (quoting Letter from Augustus Hand to Samuel Hand (Nov. 12, 1827)).

84. See Charles Samuel Stewart [Farand Stewart Fanshaw], *Notes of the Lectures delivered at the Law School at Litchfield Connecticut By the Honorable Judges Reeve & Gould (1818)* (unpublished manuscript, Harvard Law Library no. MS 2131, 2 vols.). This habit was shared by Reeve. See Reeve, *Descents*, *supra* note 76, at vi-vii.

85. Francis Bacon, *Maxims*, in 4 Francis Bacon, *The Works of Francis Bacon, Baron of Verulam, Viscount St. Albans, and Lord High Chancellor of England* (London, W. Baynes and

somewhat frustrating to Gould; his students avoided work by cribbing from the numerous copies created in prior years,⁸⁶ and others benefitted from his lectures without payment.⁸⁷

The success of the Litchfield program, as well as its inherently replicable structure, led to imitators and competitors. The independent law school became a mainstay of the young republic; by 1835, there were, or had been, eighteen other law schools independent of a university, each offering programs of instruction resonant with Reeve's and Gould's.⁸⁸ Even so, the real competition—the university law school—was only just on the horizon.

E. The University Lecturer: Round One

University law teaching had no easy birth. Although there were serious efforts to offer law classes in eighteenth century American colleges, practically speaking, they nearly all failed. The only successful eighteenth-century university law programs were in the South, in Virginia and Kentucky. Thomas Jefferson appointed his old tutor, Judge George Wythe, to be the College of William and Mary's Professor of Law and Police in 1779. Wythe held the position for twelve years before resigning to devote more time to being Chancellor of Virginia, an office he held until his fatal poisoning in 1806.⁸⁹ Wythe was succeeded at William and Mary by St. George Tucker, who, despite Jefferson's dislike of Blackstone, not only arranged the lectures in a pattern following Blackstone's outline but also published his own annotated version.⁹⁰ Tucker, in the preface to his

Son 1824).

86. Clearly the bulk of the library of student notebooks from Litchfield is marked by consistency from one lecture to the next. Augustus Hand remarked that he preferred the infallibility of copying from older notes to the recopying of his own lecture shorthand. See McKenna, *supra* note 69, at 171 (quoting Letter from Augustus Hand to Samuel Hand (Nov. 12, 1827)). Gould's sole publication was a very successful book on pleadings, which ran to numerous editions. See James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (Boston, Lilly and Wait 1832); James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (New York, B. & S. Collins 1836); James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (George Gould ed., Albany, William Gould, 4th ed. 1861).

87. See McKenna, *supra* note 69, at 171 (quoting letter from George Catlin to George C. Woodruff, Nov. 16, 1826)).

88. See Reed, *supra* note 4, Training app. I, at 443-44. There is much cause to suggest that this influence of Litchfield on the university instruction of its time is, at least, indirect. Probably more influential was the syllabus prepared and distributed by David Hoffman, which is discussed below. Even so, the practicality of the order of instruction, and the limited focus on the elements of pleading and their substance, has been a recurrent emphasis of the practical, independent law school.

89. See Robert B. Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* 11, 166 (1986). Wythe is routinely described as America's first law professor, a title that is in some sense true, even if it overlooks earlier college courses that included law, Bernard Schwartz, *The Law in America* 37 (1974); Stevens, *supra* note 4, at 4, taught by Ezra Stiles, as well, of course, as the ongoing practices of self-tutelage and apprenticeship. See *supra* note 17 and accompanying text.

90. Blackstone's *Commentaries: with Notes of Reference, to the Constitution and Laws,*

Blackstone, admitted that he had adopted the lectures because he had only three months to prepare his course, and that preparing "a regular course of *original lectures* would have required some years of study, and of labour, not only in collecting but in methodizing and arranging . . . materials. The exigencies of office did not permit this."⁹¹ Legal instruction at the college in Williamsburg lasted unbroken until 1861, when the college briefly ended the professorship.⁹²

The other successful law program was at Transylvania University, in Lexington, Kentucky, which organized a law department in 1799.⁹³ George Nicholas, the founder of the law program at Transylvania, was a correspondent of Jefferson's.⁹⁴ The school's early lectures were based on a model borrowed from Williamsburg and Charlottesville, particularly in the humanistic breadth of Jefferson's curriculum, designed to instill a Republican philosophy in western lawyers.⁹⁵ So it is no surprise that John Breckenridge and Henry Clay taught at the school, Clay lecturing there for two years.⁹⁶ Following Wythe's ideas, there were both lectures and a program of moot courts and moot legislatures.⁹⁷ Still, the lectures remained the essential means of instruction.⁹⁸

The Transylvania lecture incorporated a mixture of sources from both treatises and cases, which were frequently consulted not just for their law but also for their facts. Thus, in a contracts class, a discussion of ten or so minutes of the legal disabilities of children was followed by a discussion for several minutes of *Cory v. Cory*, considering an agreement to settle disputes within a family.⁹⁹ Transylvania's law program lasted until 1858.¹⁰⁰

of the Federal Government of the United States, and of the Commonwealth of Virginia (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

91. *Id.* at vi.

92. See Reed, *supra* note 4, at 116-17.

93. See Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 Mercer L. Rev. 673, 678 (1990).

94. See *id.*

95. See generally *id.*

96. See *id.* at 682; 1 Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America 177* (1908).

97. See Carrington, *supra* note 93, at 679.

98. Dr. Holley, the University's president, argued the benefits of law lectures, noting: The great object of a course of public lectures is to produce excitement in the teacher and the pupils, to furnish all the well known benefits of competition, to call up the most important subjects of inquiry, to point out and solve difficulties, to increase the appreciation of the mind for knowledge and its power of digestion, to lead the student to a proper method of investigation, and thus enable him to conduct his own studies with success.

Charles Kerr, *Transylvania University's Law Department*, 31 *Americana* 1, 31 (1937) (quoting Transylvania University's 1823 catalog).

99. See Jesse Bledsoe, *A Course of Lectures upon Contracts within the Jurisdiction of Courts of Law as well as of Equity* by Jesse Bledsoe, Professor of Law in [Transylvania] University (unpublished manuscript, Harvard Law Library no. LMS 4036).

100. See Carrington, *supra* note 93, at 699.

The northern universities were less successful. In 1777 Yale refused Ezra Stile's plan to create a law professorship.¹⁰¹ Dartmouth offered a haphazard smattering of law from 1796 to 1808, when a professorship of law was created, for which funds were never raised.¹⁰² Little more than false starts occurred at Columbia, Philadelphia, Harvard, and Maryland.¹⁰³

James Kent began offering lectures in Columbia College in 1793, holding a sinecure created for him by the Federalists among the college trustees after Kent lost a reelection bid in the state assembly.¹⁰⁴ Kent planned to deliver two one-hour lectures weekly throughout the winter,¹⁰⁵ during which he intended to cover

a brief review of the history, the nature, the several forms, and the just ends of civil government . . . together with an examination of such parts of the civil and criminal codes of the federal jurisprudence . . . the courts of the several states . . . and the more particular examination of the Constitution of this state. The whole detail of our municipal law, with relation to the rights of property and of persons and the forms of administering justice, both civil and criminal, will then be treated fully and at large.¹⁰⁶

Moreover, the "juridical education" he provided was meant to encourage the arts of close reasoning and public speaking, as well as an acquaintance with the doctrines of moral philosophy.¹⁰⁷ The program was a tad overambitious, and Kent managed to deliver only twenty-six lectures.¹⁰⁸ Although he thought the course tended to be "somewhat imperfect," he delivered his lectures to "seven students and thirty-six gentlemen, chiefly lawyers and law-students who did not belong to the college."¹⁰⁹ The next year, though, he had only two students, and the year after that, none.¹¹⁰ Busy as a judge and assemblyman, he resigned his chair in 1797.

101. Stile's plan is set out in full in 1 Warren, *supra* note 96, at 166-68.

102. See James Fairbanks Colby, *Legal and Political Studies in Dartmouth College, 1796-1896*, at 6 (Hanover, New Hampshire, Dartmouth Press 1896).

103. See Reed, *supra* note 4, at 45-46, 120-27.

104. The position was even funded by the Federalist-controlled state assembly. Julius Goebel, Jr. & Samuel F. Howard, *A History of The School of Law, Columbia University* 13 (Columbia University Press 1955) (quoting Resolution of the Columbia Board of Trustees, Dec. 2, 1793, 1 Kent Papers 187).

105. See *id.* at 13 (quoting Letter from James Kent to M. Kent, Jr., Jan. 7, 1794, 2 Kent Papers 191).

106. *Id.* at 14 (quoting The Present State of Learning in the College of New York 10 (1794)).

107. See James Kent, *An Introductory Lecture to a Course of Law Lectures, Delivered Nov. 17, 1794* 16-17 (New York, Francis Childs 1794).

108. Goebel & Howard, *supra* note 104, at 16 (quoting Letter from James Kent to M. Kent, Jr., March 1, 1795, 2 Kent Papers 281).

109. *Id.* at 16 (quoting *Memoirs and Letters of James Kent, LL.D.* 77 (William Kent ed., 1898)).

110. See *id.* at 17.

Over the two years, Kent had covered only federal and state constitutional law, the law of nations, and real property.¹¹¹ James Goebel's and Samuel Howard's history considered the causes of Kent's initial failures and noted that, while there is a "tradition that his students' patience was wearied by the dreariness of his style," his real problem was likely twofold: "Kent's lectures were too professional in content for undergraduate students of the arts, while too academic to attract apprentices at law steeped in the tradition of office study."¹¹² Moreover, for the law students, "one winter's lectures seem to have been enough to satisfy the demand."¹¹³ Thus one might say that, committing two hours per week to the tasks of both training and educating, Kent did neither one well, and lost the audience that each goal attracted.

James Wilson, United States Supreme Court Justice from 1789 to 1797, began lecturing in the College of Philadelphia in 1790.¹¹⁴ Like Kent, he lasted only two years. Wilson delivered a series of lectures that were meant to cover the whole of public and private law in a three-year program. After two winters, the College was merged into the University of Pennsylvania, and Wilson, never wholly engaged in the teaching post, chose not to join the new institution.¹¹⁵ His successor, Charles Willing Hare was not appointed until twenty-five years later, in 1817. He lasted a year before being "afflicted with the loss of reason,"¹¹⁶ and the school remained dormant until 1850, when it finally reopened under the hand of George Sharswood.

Wilson's lectures were narrative and often original in their consideration of the "Science of the Law."¹¹⁷ His scope was essentially that set by Blackstone, beginning with a lecture on the study of law, and then moving to the general principles of law and obligation, the law of nature, the law of nations, municipal law, man as a member of a community and a state, and then the common law in general, evidence, corporations, judicial procedure, and property.¹¹⁸ Philosophically, though,

111. See *id.* at 16 (quoting Letter from James Kent to M. Kent, Jr., Mar. 1, 1795, 2 Kent Papers 281).

112. *Id.* at 17.

113. Goebel & Howard, *supra* note 104, at 18.

114. See Reed, *supra* note 4, at 122; 1 Warren, *supra* note 96, at 172.

115. See Hampton L. Carson, An Historical Sketch of the Law Department of the University of Pennsylvania (Philadelphia, Times Printing House 1882); C. Stuart Patterson, *The Law School of the University of Pennsylvania*, 1 The Green Bag 99 (1899).

116. Carson, *supra* note 115, at 19.

117. Wilson admonished his students to pursue in the manner of John Fortescue's advice of law study to the Prince of Wales: "whoever knows the principles and elements of any science, knows the science itself—generally, at least, though not completely In the same manner when you shall become acquainted with the principles and elements of law, you may be denominated a lawyer." James Wilson, *Of the Study of the Law in the United States*, in Bird Wilson, *The Works of the honourable James Wilson, LL.D.* 1, 15 (Philadelphia, Lorenzo Press 1804) [hereinafter *Wilson Works*] (quoting John Fortescue, *De Laudibus Legum Angliae* (1470)).

118. *Wilson Works*, *supra* note 117, at xv-xvi.

Wilson rejected Blackstone's views of sovereignty, arguing that legitimate government must protect the natural rights of its members.¹¹⁹ Throughout the private law lectures, Wilson's style was that of the narrator of principles and champion of arguments, with only occasional references to statutes and judicial decisions.¹²⁰

Matters were scarcely different at Harvard. Isaac Royall, an American Tory refugee, died in England in 1781, leaving a will endowing a professorship of laws, or of medicine, in Harvard College.¹²¹ The position was unfilled until the end of the War of 1812, in 1815, when the last of the lands subject to the bequest finally sold and the estate successfully distributed subject to treaty. During that time, several attempts to establish a law chair had been made but failed owing either to disinterest of the appointee, poor finances, or disinterest by the trustees.¹²²

One of the most ambitious early law programs was attempted in the University of Maryland by David Murray Hoffman.¹²³ Hoffman was one of six law professors appointed in 1816 to a professorship. Because financial troubles interfered with the opening of the school, Hoffman gave no lectures until 1822.¹²⁴ During the years that followed, he created a vast, nine-year program of study, based on a manual of lectures, which began wending its way to the public in the first edition of *A Course of Legal Study*.¹²⁵ The *Course* was both a treatise in itself and a collection of readings and references to other standard texts organized in topics similar

119. See *id.* at 466.

120. A close reading of the three volumes of his lectures suggests agreement with the contemporary view Fisher Ames took of the introductory lecture, "Whether there are not many parts that discretion and modesty . . . would have expunged you will be at liberty to judge." 1 Warren, *supra* note 96, at 173 (quoting Letter from Fisher Ames to Thomas Dwight (Jan. 6, 1791)); see also 2 Seth Ames, *Works of Fisher Ames* 845 (William B. Allen ed., 1983) (reprinting entire letter). Ames, however, was more concerned with Wilson's criticism of English government than with the distance of his love for the common law.

121. See 1 Warren, *supra* note 96, at 281-82 (quoting Isaac Royall's will (May 26, 1778) and codicil (Nov. 31, 1779)).

122. See *id.* at 283-87. For summaries of similarly short-lived experiments in the teaching of law at Brown, Princeton, Dartmouth, North Carolina, and Vermont, see generally Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 Wm. & Mary L. Rev. 527 (1990).

123. David Hoffman, *Syllabus of A Course of Lectures on Law, Proposed to be Delivered in The University of Maryland; Addressed to the Students of Law in the United States* (Baltimore, Edward J. Coale 1824). See also M. H. Hoeflich, *Plus Ça Change, Plus C'est la Meme Chose: The Integration of Theory and Practice in Legal Education*, 66 Temp. L. Rev. 123 (1993) (placing Hoffman's theory in context with Butler's at NYU, Maye's at Pennsylvania, Hoggins at Philadelphia, and Field's at Chicago).

124. See Reed, *supra* note 4, at 123-25; David M. Hoffman, *A Lecture, Introductory to a Course of Lectures, Now Delivering in the University of Maryland* (Baltimore, J.D. Toy 1823).

125. David M. Hoffman, *A Course of Legal Study* (Baltimore, Joseph Neal, 2d ed. 1836). The *Course* was slow to find interest, and there are some indications that Joseph Story may have assisted in its promotion. See Letter from David M. Hoffman to Joseph Story, reprinted in Michael Hoeflich and Steve Sheppard, *Justice Story and Nineteenth Century Law Publishing: Two Examples* (forthcoming 1998).

to the Litchfield syllabus.

The Maryland course struggled, attracting between twenty and forty students from various states for several years. Because of delays in opening the school and sparse remuneration from the university, Hoffman opened a "Law Institute" on the side, which entailed a quizzier course of thirty lectures and a complicated moot court program, all priced to move at \$120.¹²⁶ The institute fairly smothered under its own weight, completely unable to encompass the whole of the rapidly changing American and English law.

The course of lectures was impracticable for most students, and Hoffman was rarely capable of devoting himself fully to the lectures, which took longer to deliver than he had anticipated.¹²⁷ In 1832 Hoffman gave up lecturing and fled to Europe to evade his creditors,¹²⁸ although he made a later abortive effort to open a new "Legal Institution" in Philadelphia.¹²⁹ Even so, his detailed syllabus and bibliography had a continuing influence, and *Legal Study* was assigned reading at Harvard.¹³⁰

With the exception of Hoffman, who designed, in essence, a program of independent study, the lectures of the early university were distinct, sometimes nearly divorced, from the student's reading, which was still generally designed to produce commonplace notebooks. The bulk of treatises were English treatises reprinted in the United States, occasionally with local annotations. Until Tucker published an American edition of Blackstone, there were very few general American legal materials. The few that did exist were the lectures of James Wilson, the works of two judges, Nathaniel Chipman's *Dissertations*¹³¹ and H.H. Brackenridge's *Miscellanies*,¹³² and Zephaniah Swift's Blackstonian work, used in Litchfield, A

126. David Hoffman, *An Address to Students of Law in the United States* (Baltimore, John D. Toy 1824).

127. See Reed, *supra* note 4, at 124. The lectures at Maryland are chronicled in Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822-1833*, 32 J. Legal Educ. 127 (1982).

128. See *id.* at 125. Hoffman attempted a brief return, opening a short-lived law school in Philadelphia in the 1840s. He returned to Britain and began a history of the world, which he had completed to the year A.D. 573 when he died in 1854. *Id.*

129. See David Hoffman, *Circular to Students at Law in the United States* (Baltimore, Barrett & Jones 1844).

130. See Edmund H. Bennet, *General Syllabus of Law Studies Prepared and Arranged by Edmund H. Bennet and Printed by and for the Students in Harvard Law School*.

131. Nathaniel Chipman, *Reports and Dissertations*, in Two Parts (Rutland, Vermont, Anthony Haswell 1793). This paucity of materials for the law school must be seen, however, in the light of the growing number of American law books for the nonspecialist. See M. H. Hoeflich, *Law in the Republican Classrooms*, 43 U. Kan. L. Rev. 711 (1993).

132. Hugh H. Brackenridge, *Law Miscellanies: Containing an Introduction to the Study of the Law; Notes on Blackstone's Commentaries, Shewing the Variations of the Law of Pennsylvania from the Law of England, and What Acts of Assembly Might Require to be Repealed or Modified; Observations on Smith's Editions of the Laws of Pennsylvania; Strictures on Decisions of the Supreme Court of the United States, and on Certain Acts of Congress, With some Law Cases, and a Variety of Other Matters, Chiefly Original* (Philadelphia, P. Byrne 1814).

System of Laws of Connecticut.¹³³ Otherwise, there were constitutions, statutes, and reports, with a small but growing number of specialized treatises, particularly dealing with politics and property such as John Adams's 1765 *Dissertation on the Canon and Feudal Law*,¹³⁴ and Sullivan's later *Land Titles*.¹³⁵ This paucity of secondary discussion and elaboration affected the larger community of practitioners as much as law students, and the few books published were aimed distinctly at the professional market. These included two formbooks released in 1801¹³⁶ and in 1805, Joseph Story's first book, *A Selection of Pleadings in Civil Cases*.¹³⁷ Even so, American-authored books held only a small portion of the home market: Of the 282 law books sold at the 1814 auction of Massachusetts Chief Justice Theophilus Parsons's estate the American books amounted only to statutes and reports, plus three treatises, *Livermore on Agents and Factors*, *Lawes on Pleading with Story's Addition*, and *Story's Pleading*.¹³⁸

F. The University Lecturer: Round Two

The United States began to awaken after the War of 1812. In the decades between the Treaty of Ghent and the fall of Fort Sumpter, industrial and geographic expansion caused a huge surge in the national economy, and a newly assertive Supreme Court became increasingly central to national affairs. It is little wonder that it was then that the first wave of major university law schools was formed. Not only did the earlier programs at Columbia and Pennsylvania revive, but Yale acquired a nearby independent school, Harvard filled its chairs, and a host of new university law programs were born.

Initially, these schools relied on English imports for texts. Blackstone's works were the most prominent migrants in a flood of law books from London that came ashore in reprints in Boston, Philadelphia, the city of New York, and the state capital at Poughkeepsie.¹³⁹ Dane, Kent, and Story soon followed Blackstone's model of a general commentary equally suited to the student attorney and to the practitioner, although the subject-area

133. See Zephaniah Swift, *A System of Laws of the State of Connecticut* (2 Vols.) (Windham, John Byrne 1796); *A Revision of Swift's Digest of the Laws of Connecticut* (Henry Dutton ed., New Haven, Durrie & Peck 1851).

134. John Adams, *A Dissertation on the Canon and Feudal Law*, in 3 *The Works of John Adams* 448 (Charles F. Adams ed., Boston, Little, Brown 1851).

135. James Sullivan, *The History of Land Titles in Massachusetts* (Boston, I. Thomas & E.T. Andrews 1801).

136. *American Precedents and Declarations* (Salem, Barnard B. Macanulty 1801); Thomas Harris, *Modern Entries, Adapted to the American Courts of Justice, Being a Complete System of Approved Precedents* (Annapolis, F. Green 1801).

137. Joseph Story, *A Selection of Pleadings in Civil Actions; Subsequent to the Declaration; with Occasional Annotations on the Law of Pleading* (Salem, B. Macanulty 1805).

138. See I Warren, *supra* note 96, at 213.

139. A wonderfully thorough bibliography of colonial lawbooks and their origins is available in Jenni Parrish, *Law Books and Legal Publishing in America, 1760-1840*, 72 *L. Libr. J.* 335 (1979).

book meant primarily for law students was increasingly popular.¹⁴⁰

James Kent returned to teaching in 1824, offering a comprehensive "plain and practical view of the principles of our municipal law."¹⁴¹ In his first year, he offered a series of fifty public lectures delivered in one year, along with two private lectures for enrolled students.¹⁴² The course was reduced to only private lectures the next year, after which he was "heartily tired of lecturing" and stopped doing it at all.¹⁴³ In the time thus freed, he devoted himself to publishing his *Commentaries on American Law*, the first volume of which appeared in 1826.¹⁴⁴

Kent's *Commentaries* were both an American version of Blackstone and more. Following a theme he developed in his lectures,¹⁴⁵ he included significant sections on international law, as well as the history and government of the United States. There are six major sections: the law of nations, United States government, municipal law, personal rights, personal property, and real property.¹⁴⁶ Part I was innovative, as there seems to be no earlier treatise of international law originally in the English language. Although Part II is largely a paraphrase of Supreme Court opinions, the remaining volumes are a clear narrative of commercial and property law, with a then-unusual emphasis on commercial transactions. The critical facet of the *Commentaries* was Kent's care to keep it updated in response to new opinions. He oversaw six editions between 1830 and his death in 1847, and each edition reflected state and federal opinions in each area up to that time.¹⁴⁷

Harvard's law school, finally opened in 1815, had not developed as hoped under Isaac Parker and Asahel Stearns. Their program followed the Litchfield model, if in a slightly less taxing form. It included a mixture of student recitations from lawbooks, both Blackstone and treatises in specific legal topics,¹⁴⁸ as well as faculty delivery of written lectures; students also participated in moot courts and debating clubs.¹⁴⁹ The program, however,

140. See, e.g., Asahel Stearns, *A Summary of the Law and Practice of Real Actions* (Boston, Cummings, Hilliard & Co. 1824) (discussing the law and practice of ancient remedies as a practical tool for students).

141. James Kent, *A Lecture, Introductory to a Course of Law Lectures in Columbia College*, Feb. 2, 1824, at 1 (New York, Clayton & Van Norden 1824) [hereinafter *Kent, Lectures*].

142. See Goebel & Howard, *supra* note 104, at 20.

143. James Kent, *American Law Student*, in 3 *Select Essays*, *supra* note 18, at 846.

144. James Kent, *Commentaries on American Law* (New York, O. Halsted 1826-30) (4 vols.) [hereinafter *Kent, Commentaries*].

145. See James Kent, *A Summary of the Course of Law Lectures*, in *Columbia College* (New York, Clayton & Van Norden 1824); see also *Kent, Lectures*, *supra* note 141, at 13.

146. See *Kent, Commentaries*, *supra* note 144. Kent's *Commentaries*' place in the tradition of the classical institute is well considered in John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Colum. L. Rev.* 547 (1993).

147. For a chronicle of the various editions, see Goebel & Howard, *supra* note 104, at 24.

148. Indeed, Stearns wrote a property treatise from his lecture notes. See Stearns, *supra* note 140.

149. See Asahel Stearns, *Report to Overseers of Harvard College* (Jan. 9, 1826).

was not terribly rigorous, without required readings before lectures.¹⁵⁰ It averaged only nine students per year through the 1820s.¹⁵¹

Concerns for the school's management were only resolved with a gift from Nathan Dane. Dane, a Charles Viner for America, wrote a significant encyclopedia of American law, his eight-volume *Abridgement of American Law*.¹⁵² Dane introduced each topic with a general narrative introduction, followed by a discussion of particular, leading cases. Several years of research yielded a rich layer of annotations to related cases.¹⁵³ Like Viner's work, Dane's result was too bulky for student use, although it influenced later treatise writers, whose books would greatly influence the classroom.¹⁵⁴ Moreover, Dane followed Viner's lead by endowing a chair of national law at Harvard, which was first held by Joseph Story.¹⁵⁵

Story, by then already famous as Associate Justice of the U.S. Supreme Court, assumed the Dane Professorship in 1829, a position that was designed to take only such time for lecturing as he was inclined to give, but which allowed him to write. And write he did. From his first lecture, Story set out to advance the "science of law," which

must be gradually formed by the successive efforts of many minds in many ages; that its rudiments seek deep into remote antiquity, and branch wider and wider with every new generation; that it seeks to measure the future by approximations to certainty derived solely from the experience of the past; that it must for ever be in progress¹⁵⁶

Toward that end, Story proposed a series of treatises,¹⁵⁷ which ultimately included books on bailments, constitutional law, conflicts of law, equity principles, equity pleadings, agency, partnership, and bills and notes.¹⁵⁸ These commentaries, produced

150. See Arthur E. Sutherland, *The Law at Harvard 52-53* (1967). The forms of student examinations and evolutions for the era at Harvard are discussed in Sheppard, *Informal History*, *supra* note 8.

151. Sutherland, *supra* note 150, at 62 (quoting Harvard College Catalogue, 1820-30).

152. Nathan Dane, *A General Abridgment and Digest of American Law* (Boston, Cummings, Hilliard & Co. 1823).

153. See Nathan Dane, *Manuscript of Dane's Abridgment of American law*, (unpublished manuscript, Harvard Law Library no. AKN 0553).

154. See *infra* notes 161-163 (citing Butler's syllabus and Greenleaf's schedule).

155. See Andrew J. Johnson, *The Life and Constitutional Thought of Nathan Dane* 10-11 (1987).

156. Joseph Story, *A Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, on the Twenty-Fifth Day of August, 1829*, at 8-9 (Boston, Hilliard, Gray, Little & Wilkins 1829).

157. See *id.* at 47-59.

158. *Commentaries on the Constitution of the United States: with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* (Boston, Hilliard, Gray & Co. 1833); *Commentaries on the Conflicts of Laws, Foreign and Domestic in regard to Contracts, Rights, and Remedies and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments* (Boston, Hilliard, Gray & Co., 1834); *Commentar-*

at a furious rate while Story was also serving on the Court, were taxing on Story, but eminently rewarding, reportedly bringing him royalties of ten thousand dollars a year.¹⁵⁹ The commentaries are narrative, but with numerous arguments and illustrations derived from cases and their facts, although cases were usually cited merely, if copiously, as authority for specific points in the narrative. He argued for particular points, notably in the constitutional law treatise, on which there was no case law or prior commentary. While Story certainly echoed the form of the works before his, the comprehensiveness of his books and his uniformity of treatment across a host of subjects were unusual and seem to have solidified the form of the modern subject-area treatise. Most later treatises, even into the twentieth century, have very much followed the same course.

Story's commentaries were, though, enterprises independent of his lectures. He spoke extemporaneously, threading stories of famous lawyers across particular principles of law and knitting copious instruction on the social and political obligations of the lawyer to the citizen.¹⁶⁰

In contrast to Story's easygoing approach, the new holder of Harvard's Royall chair, Simon Greenleaf, presented a more focused lecture that demanded considerable student preparation and participation. Basing his lectures in part on the study of educational method,¹⁶¹ Greenleaf

ies on Equity Jurisprudence: as Administered in England and America (Boston, Hilliard, Gray & Co, 1835); Commentaries on Equity Pleadings, and the Incidents Thereof: According to the Practice of Courts of Equity, of England and America (Boston, Little & Brown, 2d ed. 1840); Commentaries on the Law of Agency: as a Branch of Commercial & Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law (Boston, Little & Brown 1839); Commentaries on the Law of Bailments: with Illustrations from the Civil and Foreign Law (Cambridge, Hilliard & Brown 1832); Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America: with Occasional Illustrations from the Commercial Law of the Nations of Continental Europe (Boston, Little & Brown 1843); Commentaries on the Law of Partnership: as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law (Boston, Little & Brown 1841); Commentaries on the Law of Promissory Notes, and Guaranties of Notes and Checks on Banks and Bankers: with Occasional Illustrations from the Commercial Law of the Nations of Continental Europe (Boston, Little & Brown 1845).

159. See Little, Brown and Company, 1837-1987: One Hundred and Fifty Years of Publishing 19 (1987).

160. See McClellan, *supra* note 11, at 274-80 (collecting narratives of lawyers); 2 Warren, *supra* note 96, at 47-69 (collecting narratives of lawyers).

161. Greenleaf hand-copied these notes from Amos's lectures. See Andrew Amos, An Introductory Lecture upon the study of English law (London, T. Davison 1829):

Law should be studied—not as a collection of arbitrary rules & maxims & antiquated usages, retained, perhaps, long after their value has ceased—but as a liberal science—a harmonious arrangement of principles essential to the well being of society—not as an instrument of litigation—but as the great mean of preserving the peace & order & happiness of individuals & states and nations . . .

Mode of instruction—public lectures—notes taken authorities examined Public questions proposed answered in writing private motto adopted by each student

required his students to prepare for class by reading his,¹⁶² Story's, and others' books,¹⁶³ and then engaged them in spirited dialogue. The students seem to have found these two methods complementary. Future President Rutherford B. Hayes noted in his diary of 1843:

We have no formal lectures. Professors Story and Greenleaf illustrate and explain as they proceed. Mr. G. is very searching and logical in examination. It is impossible for one who has not studied the text to escape exposing his ignorance; he keeps the subject constantly in view, never stepping out of his way for the purpose of introducing his own experience. Judge Story on the other hand, is very general in his questions, so that persons well skilled in nods affirmative and negative shakings of the head, need never more than glance at the text to answer his interrogatories. He is very fond of digressions to introduce amusing anecdotes . . .¹⁶⁴

Thus, an unspoken understanding was that Story gave students the presence of the law—the great man talking of great things—while Greenleaf actually taught the legal niceties, requiring the students to learn the details. Both styles were admirable, if for radically different qualities, owing more to the person than to the pedagogy.¹⁶⁵

answers exam. By counsell prizes and certificates awarded at close of each term. Class meets in commt. of the whole professor with them—for purpose of free conversation on doubts & misapprehensions—Principles illustrated by recent trials—at which students may have been present.

Simon Greenleaf, *Mr. Amos's Introd. Lecture. Nov. 2, 1829* (unpublished manuscript, Harvard Law Library Special Collections, Simon Greenleaf Papers).

162. *E.g.*, Simon Greenleaf, *A Treatise on the Law of Evidence* (Boston, C.C. Little & J. Brown, 1842).

163. At one point, the bulletin for Greenleaf's second year lectures announced:

The Exercises in the law School during the ensuing term will be as follows:
—with Professor Greenleaf—

On Mondays, Wednesdays & on every other Friday, commencing with Friday, Sept. 3d -

At 10 A.M. in *Story on Bills of Exchange*, to be followed by *Story on Promissory Note & the Conflict of Laws*

At 11 A.M. in *Story on Equity Jurisprudence vol. 1* to be followed by *Story on Equity Pleading*.

Simon Greenleaf, *Exercises* (unpublished manuscript, Harvard Law School Special Collections, Simon Greenleaf Papers). Even so, the syllabus of Edmund Bennet frequently assigned readings from Story on commercial law, but more often assigned Kent than any other writer, followed closely by Blackstone. Edmund H. Bennet, *General Syllabus of Law Studies*.

164. 2 Warren, *supra* note 96, at 49 (quoting Rutherford B. Hayes's diary).

165. Perhaps the best contrast in styles was offered by former student Daniel Saunders, who described the professors' responses to fire alarms, a constant threat, and distraction, of the time:

It was reported to me that a fire alarm was sounded during a class examination by Professor Greenleaf; and when the class began to show more interest in the fire

Neither Story's extemporaneous style nor Greenleaf's interrogations completely supplanted the earlier Litchfield style of rote dictation of principles. This method continued to be interwoven through their efforts, to be used by Greenleaf's predecessor, John Ashmun,¹⁶⁶ and to be employed by the next generation of Harvard professors, the triumvirate of Theophilus Parsons, Joel Parker, and Emory Washburn. As had Story and Greenleaf, both Parsons and Washburn wrote successful treatises, particularly Parsons's *Contracts*¹⁶⁷ and Washburn's *Property*.¹⁶⁸ Each lectured to classes of voluntary attendance, although their oratorical styles varied: Parker, philosophical but dull, reading from pages of assigned texts; Parsons, poet and story-teller, drawing students into the discussion around contemporary illustrations of his points; and Washburn, the father-confessor, reading from a lecture manuscript based on several treatises.¹⁶⁹

Parsons's style displayed an interesting evolution. Initially, he employed hypothetical problems and invited questions from students in the audience, giving the students "a practical application of what he had read and heard."¹⁷⁰ Despite his initial success, he soon abandoned his interrogative method, finding it hard to obtain answers, both because of the time necessary to elicit a specific answer and because students so feared that the answer might be wrong that an erroneous answer became "a subject of dread."¹⁷¹

While these perennial difficulties sound familiar to a twentieth-century law teacher, part of the problem may have been that Parker was a "dry and

than in class work, the Professor quietly said, "Young men, the fire department will attend to the fire and we will attend to the subject before us . . ." After a similar alarm had been sounded during a class recitation under Judge Story, at which I was present, as the engines went clanging by, we began to peer out of the windows, and our interest was so plainly shown in the matter of the fire rather than our class work the Judge took a look out of the window himself, just as a large volume of smoke burst up from a near-by building, and said, "Run, boys, run! *Inter ignes, silent leges.*" We ran, and the Judge followed.

2 Warren, *supra* note 96, at 55 (quoting letter from Daniel Saunders).

166. Ashmun presented a straightforward lecture, with general principles of equity, punctuated with references to both statutes and treatises. His lectures were frequently organized into lists, illustrated with long discussions of cases, which he apparently enlarged and updated in later years. See John H. Ashmun, *Lectures in Equity and Medical Jurisprudence* (unpublished manuscript, Harvard Law Library no. MS 2008).

167. Theophilus Parsons, *The Law of Contracts* (Boston, Little, Brown & Co., 7th ed. with additions by William V. Kellen 1883).

168. Emory Washburn, *Real Property* (Boston, Little, Brown & Co. 1860). Although he continued actively to write, no other book of his attained the same stature. For an example of Washburn's other writing, see Emory Washburn, *A Manual of Criminal Law, Including the Mode of Procedure by Which it is Enforced: Especially Designed for the Use of Students* (Chicago, Callaghan & Co., 1878). Washburn resigned from Harvard in 1876. 2 Warren, *supra* note 96, at 401.

169. See Sutherland, *supra* note 150, at 140-61; Warren, *supra* note 96, at 302-18.

170. Joel Parker, *The Law School of Harvard College 17-19* (New York, Hurd & Houghton 1871).

171. *Id.* at 19-20.

uninteresting" conversationalist, a "mummy."¹⁷² Parsons, too, had his moments. Rufus Choate grew so bored in his class as to write in his notes, "at this point, Parsons became Pathetic!"¹⁷³ Adding to the neglect of the courses, students could choose whether to be available to answer questions from treatises at the appointed hour, and the rightmost of three seating sections of the lecture halls was reserved for loafing students who were avoiding questions from the podium.¹⁷⁴

Such student license became the rule in American law schools. Henry Booth, a Yale graduate, gave the first law lectures at Northwestern, beginning in 1859. He conducted his classes in monologue recitations. Students learned from lectures based on the standard readings, administered in a lax atmosphere,

by reading assignments in a certain textbook which was supplemented by explanation by the professor and discussions by the students. . . . Students were at liberty to attend all classes and if they were able to pass the final examination, graduated. The main thing was to get through as quickly as possible.¹⁷⁵

Despite the absence of any coordinating body or formal system of shared technique,¹⁷⁶ most American law schools at mid-century employed relatively similar lecturing styles, all more or less in the broad swathe of monologue styles. Timothy Walker, a student of Story at Harvard, not only lectured similarly at his law school in Cincinnati, but reprinted his lectures in a very successful general treatise.¹⁷⁷ At the University of Michigan, for example, David Walker, James Campbell, and Thomas Cooley lectured to students who studied from Cooley's annotated Blackstone and Story's commentaries,¹⁷⁸ as well as from Cooley's treatises.¹⁷⁹ Each presented a

172. "Professor Parker . . . made Chitty's Pleadings about as interesting as Webster's Dictionary—But then Professor Parsons made ample amends by making the Law of Contracts almost as fascinating as a dime novel." Letter from James Carmichael to Charles Warren (Oct. 10, 1907), in Charles Warren Papers, Harvard Law School Special Collections.

173. LaPiana, *Logic and Experience*, *supra* note 4, at 51 (quoting Joseph Choate, Harvard Lectures, box 22, Joseph Choate papers, Manuscript Division, Library of Congress, Washington, D.C.).

174. *See id.* (citing various sources discussing their teaching methods); 2 Warren, *supra* note 96, at 317 (stating that this section of the hall became known as "Oregon," for its distance from class affairs).

175. James A. Rahl & Kurt Schwerin, Northwestern University School of Law—A Short History to Commemorate Its Centennial, 1859-1959, at 11 (1960) (quoting Reminiscences of Thomas M. Hoynes, 16 The Alumni Journal 28-31 (June 30, 1916)). Student readings were based on Blackstone, Greenleaf, Parsons, Washburn, Chitty, and Stevens. *See id.*

176. *See* George-Auguste Matile, *A Letter Written by Him to M. Edouard LaBoulaye, Collège de France, Les écoles de droit aux États-Unis* ("Law Schools in the United States") *Extrait de la Revue historique de droit français* numéro de novembre-décembre 1863 (Paris, A. Durand, 1864).

177. Golden Age of American Law 51-52 (C. Haan ed., 1965); Timothy Walker, Introduction to American Law, Designed as a First Book for Students (Derby, Bradley & Co., 2d ed. 1846).

178. William Blackstone, Commentaries on the Laws of England (Thomas Cooley ed.,

monologue discussion of general and specific principles, illustrated almost entirely by cases from the Michigan and U.S. reports, although with little discussion of the facts of the cases.¹⁸⁰ While there were differences in preparation—Campbell wrote his notes in detail, while Cooley wrote only an outline of points from which he presented a detailed analysis—their lecturing tended to be rather similar, at least in comparison to the variety among teachers at Harvard.¹⁸¹

There were schools, though, that reflected continental teaching techniques, both because of European influences in the training of their faculty and because of the legal and cultural histories of their locales. Albany reflected some of the Litchfield-style common-law lecture,¹⁸² but it also employed a dialogue approach to discuss "two printed cases or questions . . . every week, after a reasonable time [for students] to examine them and prepare for the argument."¹⁸³ This mode was also employed at Buffalo.¹⁸⁴ William G. Hammond, discussed below, used a similar

Chicago, Callaghan & Co., 2d ed. 1876-79); Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* (Thomas M. Cooley ed., Boston, Little, Brown and Co., 4th ed. 1873).

179. Thomas M. Cooley, *The Elements of Torts* (Chicago, Callaghan & Co. 1895); Thomas M. Cooley, *General Principles of the Constitutional Law of the United States* (Boston, Little, Brown & Co. 1880); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* (Legal Classics Reprint 1987) (1868); Thomas M. Cooley, *A Treatise on the Law of Taxation, Including Local Assessments* (Chicago, Callaghan & Co. 1876); Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* (Chicago, Callaghan & Co. 1879).

180. See Harrison Hume, *Law Notes*, University of Michigan, Ann Arbor, 1867 (unpublished manuscript, Harvard Law Library No. 5310).

181. See Elizabeth Gaspar Brown, *Legal Education at Michigan 183* (Ann Arbor, University of Michigan Law School 1959) (excerpting Thomas M. Cooley, To Wit Department of Law, University of Michigan, Class of '94). Cooley's career and teaching are discussed in contrast to the approaches at Harvard and in the context of Cooley's intellectual climate in Paul D. Corrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas MacIntyre Cooley*, 49 *Stan. L. Rev.* 495 (1997).

182. M.E. Barlow, *Notes from Professor Dean's Lectures*, Albany, 1862 (Harvard MS 5251 6 vols.). Barlow's notes are of a typical dictation lecture, with various principles enumerated, and carried in this style from one lecture to the next. Case annotations were made in the margins. Class notes were clearly not to be missed, and in the week of Sept. 16, 1863, the student seems to have asked someone else to take his dictation for him. See 5 *id.* at 30-43.

183. Henry Strong McCall et al., *Albany Law School, A Historical Sketch* 2 (reprinted from *Albany Argus*, Albany, May 1, 1877).

184. Judge Charles Daniels lectured the first students in Buffalo Law School, then in Niagara University in 1887. The course was a hybrid of lectures from treatises and law-office clerking. The course of lectures was said to be those of

a practical school. It does not go deeply into the history or theory of law; but it points out to its students the things they most need to know in successfully practicing their profession and making a living. It explains the practical bearing of principles that are most useful to clients in ordinary affairs, so that its students may give sound advice in common business matters. . . . In a word, it aims to inform its pupils concerning the principles and methods which every lawyer must know to be a valuable man to those who employ him, whether in consultation or in court.

technique at Iowa in 1869 which he imported from Heidelberg, Germany.¹⁸⁵ Still, the dialogue was not a specifically continental device; in the civil code world of the University of Louisiana at New Orleans (now Tulane University) the Code Napoleon was taught alongside Coke and Blackstone in lectures of which Reeve and Story would have been proud.¹⁸⁶

Not all lectures concentrated solely on the law of the cases. Story emphasized the duties of the lawyer to society in nearly every lecture, as did others.¹⁸⁷ Other such variations abounded, although within the common frame of lecture method, which persisted in most schools into the last quarter of the nineteenth century.

The University of Pennsylvania reopened its law department in 1850 under the leadership of the dour judge and Blackstone annotator, George Sharswood.¹⁸⁸ Lectures in the Penn school were provided by part-time lecturers, who generally followed the national pattern.¹⁸⁹ John Hare, though impressed by the new research in historical jurisprudence,¹⁹⁰ still

Gilbert J. Pedersen, *The Buffalo Law School: A History* 34 (1962) (quoting Albany Law Journal, Jan. 7, 1899).

185. See, e.g., William G. Hammond, *American Law Schools in the Past and in the Future: An Address Delivered Before the Law Department of the State University of Iowa* (June 20, 1881) (Iowa City 1881).

186. See Lamar C. Quintero, *The Law School of the Tulane University of Louisiana*, 2 *The Green Bag* 116 (1890); John Minor Wisdom, *A Piquant History of the Tulane Law School*, 1 *Tulane Lawyer* 2-10 (1979).

187. See *supra* note 160 and accompanying text; see also Paul D. Carrington, *Legal Education for the People: Populism and Civic Virtue*, 43 *U. Kan. L. Rev.* 1 (1994); Michael Hoefflich, *Virtue in the Nineteenth Century Law Lecture* (forthcoming 1998).

188. See Gary B. Nash, *The Philadelphia Bench and Bar 1800-1861*, 7 *Comp. Stud. in Soc'y & Hist.* 203, 208 (1965). A glimpse of Sharswood's character and time is provided in marginalia of a copy of Sharswood's Blackstone, owned by Williams Carter and discussed by University of Pennsylvania librarian Cynthia Arkin:

This day—May 31st 1883 I went at 10 A.M. to the funeral of Judge Sharswood.

Who died at a quarter before seven o'clock on the morning of last Monday, May 28.

The Judge looked better & happier in his coffin than I ever saw him look out of it.

May God rest his soul in spite of the damned officiating presbyterian Parson.

Marginalia in William Blackstone, *Commentaries on the Laws of England* (George Sharswood ed., Philadelphia, J.B. Lippincott Co. 1890) (copy owned by Williams Carter Sharswood, University of Pennsylvania Biddle Law Library Special Collection).

189. See *The History of the Law School* The 1916 Class Report, University of Pennsylvania Law School, at 85-88.

190. One of Hare's students restated in his class notes:

To consider the growth of jurisprudence and law we must go back to the times when man lived in tribes. . . . It is evident that the growth of jurisprudence closely followed and was closely allied to this extension of relations between the various nations of the world. Law is also a moral science, and thus legal principles draw largely on ethics.

Henry Hoyt, Jr. *John Hare's Law Lectures, University of Pennsylvania* 1 (Harvard Law School manuscript MS 2151). These notes are duplicates, probably produced by planograph, for distribution to later students by their transcriber. The bulk are in blue paste ink. The last two lectures are in black paste.

conducted his lectures in the traditional fashion by illustrating his points with facts of cases and statements of jurists and drawing his points together in a broad context of law against the background of sociology and ethics.¹⁹¹ He developed these contextual points over time, as his lectures in 1887 reflect his historical points in much greater detail than did his earlier notes.¹⁹²

Neither Hare nor his colleagues, Algernon Sidney Biddle and James Parsons, however, would have found their teaching styles—in monologues of legal principles punctuated by cases chosen from England and America and interspersed with student quizzes¹⁹³—to be incongruous with the Harvard of Parker and Washburn or with the Columbia of Theodore Dwight. Defending his lectures against the advancing spectre of the case method, Parsons argued as late as 1875 against the “delusive theory that the law is gradually developing itself into a science,” by arguing that students must have a system of understanding before venturing into the cases.¹⁹⁴

The University of Virginia, ever happily in the shadow of its founder—and following strongly in his interdisciplinary tradition of the concurrent study of law, social science, and humanities,¹⁹⁵ had observed

191. The same student's notes later included the following statements:

Parol contracts are now divided into two heads, viz: 1. Promises in consideration of promises. — 2. Promises in consideration of performance. It is a rule of law that the right of action must begin with the party from whom the consideration flows. In *Bymin v. Boistle* 6th Watts 182 it was decided by Sergeant, J. “That if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested.” In *Edmunson v. Penny for use of McCauldless* 1st Barr 334. It is held that “a parol promise to bestow to A for B's services as preacher twenty-five dollars, and to cease at this date, will support an action in the name of B.” In this case *Chief Just. Gibson* says “Whatever may be the conflict of opinion in the earlier cases, it is now settled that a parol promise to one for the benefit of another, can support an action on it only by him from whom the consideration moved, or who was the meritorious cause of it.

Id. at 5.

192. See George Wharton Pepper, *Lectures on Contracts* by Prof. Jos. Clarke Hare, LL.D. (Lect. 1, 10-4-87) (University of Pennsylvania, Biddle Law Library, Special Collections manuscripts). These notes also appear to be planographed.

193. George Wharton Pepper, *Lectures on Evidence* by Prof. Biddle (University of Pennsylvania, Biddle Law Library, Special Collections manuscripts); George Wharton Pepper, *Lectures on Partnership* by Prof. James Parsons (University of Pennsylvania, Biddle Law Library, Special Collections manuscripts). These notes may be duplicates as well.

194. James Parsons, ‘Law as a Science,’ The Introductory Lecture Delivered at the University of Pennsylvania at the Annual Opening of the Annual Course in the Law Dept. (Oct. 1, 1875) (Philadelphia, King & Baird, Printers 1875).

195. See Thomas Jefferson, *Education for a Lawyer*, in *The Complete Jefferson* 1043-45 (Saul K. Padover ed., 1943); see also Letter from Thomas Jefferson to John Tyler (May 26, 1810), in 12 *Jefferson Writings*, *supra* note 43, at 391; Letter from Thomas Jefferson to Dabney Terrel (Feb. 16, 1821), in 15 *Jefferson Writings*, *supra* note 43, at 318-22. For arguments that Jefferson and other early federal humanists presaged the modern movement of law and social science, see Brainerd Currie, *The Materials of Law Study*, 3 J. Legal Educ. 331 (1951).

the stewardship of Tucker and John Minor on a course of relative pedagogical stability.¹⁹⁶ The professors lectured in monologues from Blackstone, Coke, and Madison, later adding Story and other course-specific textbooks, with a daily exam preceding each lecture, testing material from the previous lecture.¹⁹⁷

G. *The First American Legal Science*

The organization of their materials, the "science" everyone seemed so concerned about, was a rather loose-knit idea. It seems, however, to have been very much in the tradition of Newtonian observation and organization: there is a place for everything, and everything would be in its place when sufficiently understood. The causal agent for this organization was either God or nature, and man merely needed to understand the whole of the system to work harmoniously in it. Thus, the system of laws, like systems of biology and geology, could be catalogued once all of the laws were discovered. Indeed, there is considerable similarity between Story's treatises and Linnaeus's classifications of plants.¹⁹⁸ All the science a student needed was to be exposed to the most complete articulation of the system of law and its catalogue of related principles, made to memorize it, and then taught to select the right principle for the right occasion. The archetype of such a program was that of Theodore Dwight.

H. *Theodore Dwight: Acme of University Lecturers*

In general, the university lecture given to students preparing from treatises assumed a variety of forms, occasionally including spontaneous questioning of students, but more often asking for no more than recitation of prepared readings from the treatises. This style of student preparation reached its personification in Theodore Dwight, Warden of Columbia Law School. Dwight was the model of the scientific lecturer, with a system of legal principles for dictation into the pages of carefully kept student manuscripts. Brought to Columbia from an established teaching career at Hamilton College, Dwight had already evolved a method of lecturing that was resonant of Tapping Reeve but distinctly more systemized following Dwight's maxim, "Principle before practice."

Dwight's lectures were highly programmatic, reflecting both his deliberate choice of a rote method to improve the "average student" and

196. John Ritchie, *The First Hundred Years: A Short History of the School of Law of the University of Virginia for the Period 1826-1926*, at 17-53 (1978).

197. See University of Virginia, *Law School of the University of Virginia* (July 10, 1851) (College catalog).

198. See Carl von Linné, *Philosophia Botanica: In qua explicantur fundamenta botanica cum definitionibus partium, exemplis terminorum, observationibus rariorum, etc.* (Stockholm, Apud Godfr. Kiesewetter 1751). For a more detailed study of science as a metaphor for law in the early nineteenth century, see Berman & Reid, *supra* note 54; I Bernard Cohen, *Science and the Founding Fathers: Science in the Political Thought of Thomas Jefferson, Benjamin Franklin, John Adams, and James Madison* (1995).

his view of legal science, which for him was necessary for the rule of law.

It is essential to the due administration of justice that precedents should be followed unless there is some convincing reason to the contrary. It is only in this way that the law can be developed into a science. By means of this principle, a system of jurisprudence may be made to consist of a methodical collection of the principles involved in the decided cases.¹⁹⁹

To encourage such a "methodical collection," Dwight recited lectures encompassing an outline of lists of principles and rules, illustrated with examples from cases,²⁰⁰ all of which the students laboriously inscribed into manuscript books, which apparently served as a basis for catechismic recitation.²⁰¹ His lecture on statutory

199. Theodore W. Dwight, *Commentaries on the Law of Persons and Personal Property, Being an Introduction to the Study of Contracts* 17 (Edward F. Dwight ed., Boston, Little, Brown & Co. 1894). True to his idiom, Dwight articulated seven rules by which to determine cases worthy of such treatment. Dwight's conception of "legal science" is particularly resonant with that earlier expressed by Silas Jones. See Silas Jones, *An Introduction to Legal Science: Being a Concise and Familiar Treatise on such Legal Topics as are Earliest Read by the Law Student* 50-57 (New York, John S. Voorhies 1842).

The treatise is a traditional march through personal and real property. A narrative of general principles is accompanied by references and notes to primarily American, but also significant numbers of older English, cases, treatises, and commentaries, and American and English statutes. He was prone to some discourse concerning particular cases in his text, particularly facts of cases illustrative of his principles of law, but the larger portion of the text is narration of these principles. Dwight had no reluctance to distribute his lectures for the use of his students, having earlier authorized a distribution of copies of his own notes among the students. See Theodore Dwight, *Lectures on Municipal Law*, (Typescript) (1881) (Columbia Law School treasure room CU D96Lmb) ("The secretary of the Law School has been authorized to issue thirty copies hereof, and for the use of Columbia Law College School only."). Moreover, *The Columbia Law Times*, a monthly magazine for students in law and political science, often printed Dwight's lecture notes, beginning in 1887, with his lectures on Blackstone, "[o]fficially revised," for nine pages, and his lectures on Parsons on Contracts was printed for five more. *Columbia Law Times*, (Vol. 1-2) 53-57. For the place of the *Law Times* and its predecessor in the development of student-edited law reviews, see Michael I. Swygert & Jon. W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 *Hastings L.J.* 739, 764-58 (1985).

200. Dwight described his method as "the inculcation of the elementary rules of law applicable to its leading branches, by presenting them in the clearest form, under a carefully studied and logical arrangement, and fixing them in the mind by apt illustration and the drill of recitation and review." Theodore Dwight, *Columbia College Law School*, 1 *The Green Bag* 152 (1889); see also George C. Austin, *The Dwight Method of Legal Instruction*, 9 *Q. L. Rev.* (1893).

201. The notes of nineteenth century students were meticulous. The bound copies of some are models of calligraphy, organization, and completeness. Most include tables of contents or indexes, lecture by lecture. While some of Dwight's students marked the lectures by date, all used his method of organizing the lectures by chapter headings. Dwight clearly preferred *vide* to "see." The habit is not only reflected universally in student notes but led to some rather curious marginalia. See Henry S. Davis, *Lectures of Columbia College Law School (cont.) Junior Year, 1867* (Columbia Law School treasure room CU D96 Lda) ; Samuel Greenbaum, *Law Lectures by Theo. Dwight, LL.D., Book First, 47* (1872) (Columbia law School treasure room CU D 96 Lec). A study of Theodore Roosevelt's notebooks from Dwight's lectures is presented in Robert B. Charles, *Legal Education in the Late Nineteenth*

interpretation is typical. In it he presented five major rules necessary to affect "the great and leading rule of interpretation . . . that the meaning of the writing or text must be ascertained."²⁰² Each rule was lettered in an outline form:

A. The interpreter has a right to assume whatever is necessarily implied. . . .

B. Where there is nothing to lead to the contrary conclusion, language must be taken in its ordinary and popular sense, but words employed in any art, profession, trade, or religious sect must be taken in a special or technical sense.

C. The letter of the writing is not to be followed to the exclusion of the intent.

D. The meaning must be contained within the text, and the interpretation cannot add to it a sense which is not found therein by mere conjecture, supposition, or arbitrary interpretation.

E. The whole of the writing must be taken into account.²⁰³

Moreover, there were sixteen special rules which were generally amplifications of the broad concepts of the general rules, and ten more rules of greater detail for construing statutes that conflict with other laws or reason.²⁰⁴ The lectures included more than lists alone, being punctuated not only with frequent cites to cases but with relatively fact-laden examples to support various points.²⁰⁵ All in all, there is thoroughgoing consistency in Dwight's lectures; once he established the lectures, his presentations to

Century, Through the Eyes of Theodore Roosevelt, 37 Am. J. Legal Hist. 233 (1993).

202. There are numerous student notebooks containing this lecture practically without change. The quotations above are from Theodore Dwight, *Dwight's Lectures*, 1876 (Columbia Law School treasure room CU D 96Ld) [hereinafter *Dwight's Lectures*].

203. *Id.* at 15-16. The outline of these topics is reproduced in Sheppard, *An Introductory History*, in Closen et al., *supra* note 3.

204. *Dwight's Lectures*, *supra* note 202, at 20-26.

205. One of his favorites, the rejection of *mitior sensus*, was invariably rolled out in each year's torts class in municipal law:

In interpreting the alleged slanderous words, the practice formerly was to give them the meaning most favorable to the slanderer. This was the so-called *mitior sensus* and an instance or two will suffice. In one case, the words were, "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows." It was held that the words must be taken to mean bars of iron *fastened* in the windows and not loose. In this view, there was no slander, for the bars were then real estate, and one cannot steal real estate. So where a person said that "Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head, so that the one part lay on one shoulder and the other on the other," it was held that there was no cause of action, since though Sir Thomas might have cleaved the head into parts, the wound might not have been mortal. This absurd doctrine has long since been exploded. The correct rule is to take that meaning which the supposed utterer to convey.

Dwight's Lectures, *supra* note 202, at 41-42 (citations omitted).

students varied only in occasional reflections of new law.²⁰⁶

With the rote approach of his dictated lectures, Dwight also employed a colloquial examination of students, testing their reading and understanding of assigned texts. He unwaveringly pursued the predetermined answer, although he seems to have been flexible in moving students from their errors.

He never mortified a student; if an answer were manifestly wrong, he would say: "Would you not rather say it is so and so." Sometimes he would put to every student in turn the same supposed case and ask him his opinion upon it, and after each had answered, give the true solution. This afforded an opportunity to the clever ones to make a little proper display. We learned very much, too, by the questions which we asked of him in the classroom, and which he, like another Socrates, freely encouraged.²⁰⁷

Dwight used this technique to draw out understanding of the set texts, with at least an elementary analysis of them. It would seem he did not push overly hard for a sophisticated or imaginative understanding of the principles of law to be learned, although such efforts were applauded when found. "No student ever had his 'faculties tried in the highest degree,' or was ever driven to a standstill. Every student was 'encouraged.' Occasionally a student of ability or earlier training did discriminate or analyze: this was regarded with general favor."²⁰⁸

Dwight's hyper-didactic methods, however, were never universally accepted among law teachers, not even among the rest of the Columbia faculty. From 1857 until 1872, Francis Lieber conducted his lectures in jurisprudence and political theory in the manner of a traditional lecture.²⁰⁹ John W. Burgess would fulfill this task even following the 1880 removal of his courses to the new graduate school of political science, and

206. Indeed, the "thievish rogue" story is repeated with no variation year after year. *See, e.g.*, 1 George Baker, *Law Lectures Delivered to the Junior Class of Columbia College Law School by Prof. Theo. W. Dwight, LL.D.* During the Junior Term of 1869-70, at 42-43 (Columbia Law School treasure room CU D96L) ; 1 Towson Caldwell, *Dwight's Lectures, Municipal Law 64-63 (1877)* (Columbia Law School treasure room CU D96La) ; John B. Fine, *Lectures on Municipal Law by Theodore Dwight, LL.D.* Columbia Law School, 83-87 (1878-79) (Columbia Law School treasure room CU D 96 Lma) ; 1 Herbert L. Satterlee, *Municipal Law 29-30 (1884)* (Columbia Law School treasure room D96 L) ; Alfred P. Thorndike, *Municipal Law 29 (no date)* (Columbia Law School treasure room D96 Lb) ; 1 T.H. Walser, *Lectures of Municipal Law by Theodore Dwight, "76 "Love's Labor Lost" 113-15 (1876)* (Columbia Law School treasure room D 96Le).

207. Goebel & Howard, *supra* note 104, at 37 (quoting Richards, in Swift's Tribute 18 (1891)).

208. *Id.* (quoting Beekman, in Swift's Tribute 25 (1891)). For a sketch of the reverence and popularity in which Dwight was held, see Whitney S. Bagnall, *The Poet and the Professor: Scenes from the Early Law School*, 44 Colum. Libr. Columns 26 (1995).

209. *See* Goebel & Howard, *supra* note 104, at 46-48.

continuing until his retirement in 1913.²¹⁰

Dwight, however, remained the headliner of the law school; in 1868, a trustee moved for the appointment of a junior lecturer in municipal law because Dwight's death or resignation would cause the whole school to "evaporate & evanesce the next day."²¹¹ Indeed, he was still revered as a lecturer and paragon of legal education at Columbia when he was cast out in 1891 by Seth Low, Columbia's new president, and replaced with a young disciple of the "case method" of law teaching, William Keener.

Although Dwight had built the largest law school in America, Low considered it "moribund" and asked Keener, who had recently joined the faculty from Harvard, to design a new curriculum. Keener's and Low's plan involved a closer relationship with the department of political science, which never materialized, and a greater reliance on the case method, which did.²¹² Dwight's initial defense of the old school set out the benefits of the law school's employment of his version of the "Socratic method," the most distinct contrast to other approaches being clear:

The method adopted in the Law School seeks to inculcate great principles of law, leaving to the Student to apply them by his own reasoning to special cases as they arise. It is thus truly educational by drawing out the powers of the Student and giving him comprehensive views. It is in sharp and as we think most favorable contrast with instruction by concrete cases, which leaves the Student without a guiding principle to connect them. Law is nothing without logic, and true logical methods should be pursued, and the Student trained not merely to think but to think on the spot, instead of acquiring his knowledge simply by absorption.²¹³

Even so, Dwight was fighting in the rear guard. Low's plan was implemented, and Dwight retired. Keener and his casebooks thus had free reign, although some courses were still not fully converted. Keener's own jurisprudence course continued to use a selection of theoretical readings,²¹⁴ and in his contracts course, he initially assigned readings from treatises.²¹⁵

210. *See id.*

211. *Id.* at 64 (quoting George Templeton Strong Diary, May 13, 1868 (housed in Columbiana Library, Columbia University)).

212. *See id.* at 124-26.

213. Letter from Theodore Dwight to Seth Low (Jan. 28, 1891), in Goebel & Howard, *supra* note 104, at 127.

214. For an example of the theoretical readings used by Keener, see William A. Keener, *Selections on the Elements of Jurisprudence* (St. Paul, West Publishing Co. 1896).

215. For an example of a treatise Keener assigned, see William A. Keener, *Selections from Leake's Elements of the Law of Contracts and Finch's Cases on Contracts: Arranged as a Text-book for Law Students* (New York, Baker, Voorhis & Co. 1895). His "purer" casebook was published three years later. William A. Keener, *A Selection of Cases on the Law of Contracts* (New York, Baker, Voorhis & Co. 1898).

The Columbia faculty prior to Dwight's fall—George Chase and Robert Petty—resigned from Columbia and moved across town, opening the New York Law School, where Dwight's principles were continued, although with a twist.²¹⁶ Dwight's method was followed religiously at first, even if with some concessions, such as Chase's introduction of his own casebook.²¹⁷ The curriculum was based on a detailed syllabus of 145 pages, printing a summary of the topics and rules from Dwight's notes, albeit in slightly varied order. The syllabus was published in a single volume, then priced at a quite reasonable fifteen cents.²¹⁸ But the syllabus was also bound into larger notebooks, with four leaves of notebook paper inserted after each page of syllabus. Students then used these notebooks for transcribing the lectures into pages following the appropriate printed page.²¹⁹ The Dwight method seems not to have long survived the transplant, though, and is believed to have lost its prominence even before Professor Chase's death in 1924.²²⁰

Other schools continued the wholesale use of lectures and treatises. California Chief Justice Seranus Hastings's College of Law in San Francisco had long employed a system of lecturing similar to Dwight's comprehensive outline of the municipal law. Hastings College refined its lectures along the "scientific and practical" lines of John Norton Pomeroy's system.²²¹ The Pomeroy System was a framework of intensely detailed syllabi,²²² comprehensive treatises,²²³ and recent case opinions in each

216. See George Chase, *The Dwight Method of Legal Instruction as Compared with Other Methods* (1894) (Harvard pamphlet S US 907 CHA).

217. See George Chase, *Preface to Leading Cases on the Law of Torts* (St. Paul, West Publishing Co. 1891). In his preface, Chase noted that the book was "intended to supplement and illustrate the statements of legal principles which are set forth in the various treatises upon this subject. Object lessons, showing the application of principles, are as efficacious in the study of law as in the study of other branches of learning." *Id.*

218. See New York Law School, *Law Syllabus*, New York, 1904.

219. See *Law Syllabus of William van Wyck* (Columbia Law School treasure T L6167).

220. Telephone interview with Professor William LaPiana, New York Law School (July 15, 1995).

221. John Norton Pomeroy, *The Hastings Law Department of the University of California: Inaugural Address by John Norton Pomeroy, Aug. 8, 1878, at 1* (San Francisco, A.L. Bancroft & Co. 1878). Pomeroy's standard biography, is John N. Pomeroy, Jr., *John Norton Pomeroy*, in William D. Lewis, 8 *Great American Lawyers* 91 (1909) [hereinafter *Pomeroy Biography*]; see also C.W. Slack, *Hastings College of the Law*, 1 *The Green Bag* 522 (1889).

222. See, e.g., John Norton Pomeroy, *Syllabus of Lectures on Remainders and Executory Interests* (Hastings College of the Law, University of California) (Yale Law School Library pamphlet); John Norton Pomeroy, *Syllabus of Lectures on Remedies* (Hastings College of the Law, University of California) (Yale Law School Library pamphlet); John Norton Pomeroy, *Syllabus of Lectures on Uses and Trusts* (Hastings College of the Law, University of California) (Yale Law School Library pamphlet).

223. See, e.g., J.F. Archbold, *A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence, in Indictable Cases* (John Norton Pomeroy ed., New York, Banks & Bros. 8th ed. 1880); John Norton Pomeroy, *Code Remedies* (Thomas A. Bogle ed., Boston, Little, Brown, & Co. 4th ed. 1904); John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (New York, Hurd and Houghton 8th ed. 1885); John

subject with a discussion-based class lecture.²²⁴ Pomeroy's system was rare among treatise-writers in that he placed considerable emphasis on statutes in both his texts and syllabi. The unforgettable bits of the system are Pomeroy's ponderous outlines, every law sketched in bracketed classifications and logical sets, a form seemingly borrowed from a seventeenth-century text by Serjeant Finch.²²⁵

Pomeroy's sketch of property rights as *Rights and Duties Relating to Things and Transactions as Their Object* is representative: Primary rights are in two categories, *in rem* and *in personam*. *In rem* rights are in three categories, relating to their objects, their essential nature, and their means of acquisition. *In personam* rights are in two categories, according to whether they arise from contracts or quasi-contracts. Each of the categories of *in rem* rights established by a different relation then devolves into three to five more elements, each of which is, in turn, described by two more levels of subdivision.²²⁶ It would be a mistake from such a list to believe,

Norton Pomeroy, *An Introduction to Municipal Law* (San Francisco, Bancroft-Whitney Co., 2d ed. 1886); John Norton Pomeroy, *An Introduction to Municipal Law, Designed for General Readers, and for Students in Colleges and Higher Schools* (New York, D. Appleton & Co. 1864); John Norton Pomeroy, *Lectures on International Law in Time of Peace* (New York, Houghton, Mifflin & Co. 1886); John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure: A Treatise Adapted to Use in All the States and Territories Where That System Prevails* (Boston, Little, Brown, & Co. 3d ed. 1894); John Norton Pomeroy, *A Treatise on Equitable Remedies; Supplementary to Pomeroy's Equity Jurisprudence* (San Francisco, Bancroft-Whitney 1905); John Norton Pomeroy & Carter Pitkin Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America Adapted for All the States, and to the Union of Legal and Equitable Remedies under the Reformed Procedure* (San Francisco, Bancroft-Whitney 1892); John Norton Pomeroy, *A Treatise on the Law of Water Rights: Being a Rev. and Enl. Ed. Of "Pomeroy on Riparian Rights," with Several Additional Chapters by Henry Campbell Black* (St. Paul, Minnesota, West Publishing Co. 1893); John Norton Pomeroy, *A Treatise on the Specific Performance of Contracts as it is Enforced by Courts of Equitable Jurisdiction in the United States of America* (New York, Banks & Brothers 2d ed. 1897); see also Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (John N. Pomeroy ed., New York, Baker, Voorhis & Co. 2d ed. 1874).

224. It is unclear now exactly how much of Pomeroy's discussion was designed to elicit a predeterminable, "correct" answer, and how much was designed to spark original thought. Thomas Barnes was convinced that the discussions were toward the latter end, but this conclusion seems drawn from a rather ambiguous description. Henry McPike recalled that, during his class under Pomeroy, Pomeroy would "pause and quiz the class, passing questions around indiscriminately, and treating all answers with gravity, no matter how far off any of them might be. He corrected errors in the most kindly spirit . . ." Thomas Garden Barnes, *Hastings College of the Law, The First Century 113* (Hastings College of the Law Press, 1978) (quoting *The Golden Jubilee Book, 1878-1928*, at 41). Anthony Chase asserts that Pomeroy's classes at the Law School of the University of the City of New York may have been the first case method classes. See Anthony Chase, *The Birth of the Modern Law School*, 23 *Am. J. Legal Hist.* 329, 333 n.18 (1979).

225. Serjeant Henry Finch, *Law, or a Discourse Thereof* (W.S. Hein 1992) (1759). Barnes states that Pomeroy "had read" the book, although no attribution for this knowledge is provided. See Barnes, *supra* note 224, at 102.

226. Pomeroy's chart from which this is drawn is reproduced in part in Barnes, *supra* note 224, at 103.

however, that Pomeroy's work was intrinsically unsubtle. For instance, while his consideration of the federal commerce power in constitutional law is compartmentalized, the treatment of each theory is thorough, relating points not only among the various theories but also to alternatives in the constitutional theory of England, France, and the United States.²²⁷

The similarity between Pomeroy's method and Dwight's is hardly random. Both were nearly fanatical in their use of categories and lists to present the doctrines of each area of law. Both men presented their lists in relationships moving from levels of great abstraction to great specificity. That such specific approaches could evolve on opposite coasts is not too difficult to explain—Pomeroy studied Classics in Hamilton College, New York, while Dwight was both tutor and professor there.²²⁸

The Pomeroy System prevailed at Hastings until the faculty expanded to the point that few of the teachers knew the comprehensive scheme or the subtle weights and emphases among the various facets of municipal law. 1894 was the last year in which a Pomeroy book was assigned, after which casebooks occupied the field.²²⁹

Other schools persisted to varying degrees in following the lecture method. The University of Virginia followed the view of John Barbee Minor, reflected in the words of William Minor Lile, who maintained the best lectures had no student discussion:

Our theory is that a large part of the body of the law rests upon no particular reason, but is conventional, or may we not call it arbitrary? This cannot be deduced by any course of reasoning howsoever subtle or astute. The mere statement of the rule, with a practical illustration is its best exposition.²³⁰

Virginia followed its Blackstone-based course of textbook and lecture and only adopted the casebook in the 1930s.²³¹

Yale avoided the case method and employed a method based on treatise readings and oral quizzes until after the turn of the century.²³² The "Yale System" was adopted and advertised in contrast

227. See generally John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States, Especially Designed for Students, General and Professional* 269 (Boston, Houghton Mifflin 1886). Pomeroy's constitutional thought is explored in Stephen A. Siegal, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 Wis. L. Rev. 1431 (comparing and contrasting Cooley and Tiedeman).

228. See Catalog of the Corporation, Officers & Students of Hamilton College, 1846-47 (Utica, R.W. Roberts 1846). Pomeroy studied at Hamilton from 1843 until "a short time before the graduation of his class." *Pomeroy Biography*, *supra* note 221, at 92. Hamilton College records confirm that he graduated in 1847, being conferred a degree with his class. Telephone conversation with Frank Lorenz, Archivist of Hamilton College (July 28, 1995).

229. See Barnes, *supra* note 224, at 128.

230. John Ritchie, *The First Hundred Years: A Short History of the School of Law of the University of Virginia for the Period 1826-1926*, at 57 (1978) (quoting Centennial of the University of Virginia 1922); Thomas J. Michie, *John Barbee Minor*, 7 *The Green Bag* 401 (1895) (admiring portrait of Minor on the occasion of his death by a former student).

231. See Ritchie, *supra* note 230, at 58-59.

232. A depiction of the early use of lectures at Yale can be found in Frederick C. Hicks,

to Harvard's case method in the school's announcement of 1887-88.²³³ The system was based on some lectures, but primarily on students' private study and recitation in response to questions posed by the instructor.²³⁴ By 1892-1893, cases had been introduced as a source of study,²³⁵ although the Yale System continued until 1903.²³⁶

While the lectures at Virginia, Yale, and other schools followed such traditions, there was experimental variation as well. Brooklyn Law School presented its entering students with a series of orientation lectures that were particularly well-named, spending, as they did, much of their content describing development of legal systems from the ancient Egyptian and Japanese systems up to the jurisdiction of the New York municipal courts.²³⁷

Despite such innovations, the number of institutional holdouts for lectures became few, and the evolution of the University of North Carolina is more paradigmatic. Judge William Horn Battle's private law school in Chapel Hill was incorporated into the University of North Carolina in 1899.²³⁸ Since 1844, Judge Battle had employed a lecture method based upon the standard commentaries, augmented with references to the thirty-seven volumes of state reports then available, and presented lectures for three hours each week. By 1893, the school required eight hours of lectures weekly, and, for roughly a decade, the case method "by gradual

Yale Law School: From the Founders to Dutton 49-55 (Yale Library Publication No. 3, June 1936).

233. Frederick C. Hicks, *Yale Law School: 1869-1894, Including the County Court House Period* 32 (Yale Library Publication No. 4, 1937).

234. A Yale Law School Announcement stated:

The method of instruction, especially in the undergraduate course, is mainly that of recitations. It is the conviction of the Faculty of this Department, as well as the tradition of the University, that definite and permanent impressions concerning the principles and rules of any abstract science are best acquired by the study of standard textbooks in private, followed by the examinations and explanations of the recitation room. Hence, although certain subjects are separately taught by lectures, . . . care is taken that the same topics shall be covered by recitation work The recitation hours, however, are not devoted entirely to the questioning of the student. While this is done with sufficient thoroughness to hold him up to his work of preparation, ample opportunity is afforded for a free colloquial discussion of the subject of the less and for the presentation and solution of the difficulties which he may have encountered in his private study.

Hicks, *supra* note 233, at 33 (quoting Yale Law School's Announcement 1887-1888); see also Leonard M. Dagget, *The Yale Law School*, 1 *The Green Bag* 239, 249-50 (1889).

235. See *id.* at 34.

236. See Frederick C. Hicks, *Yale Law School: 1895-1915, Twenty Years of Hendry Hall* 43-44 (Yale Law Library Publication No. 7, Sept. 1938).

237. See William B. Carswell, *Outline of Orientation Lectures* (Brooklyn 1952) (Harvard Pamphlet US 907 CAR).

238. See Albert Coates, *A Task of Legal Education in North Carolina* 11 (1938) (Harvard Pamphlet US 907/mc COA); see also Albert Coates, *The Story of the Law School at the University of North Carolina*, 47 *N.C. L. Rev.* 1 (1968).

accretion" increased its profile, becoming the dominant tool by 1910.²³⁹

I. *The Lecture and Treatise in the Twentieth Century*

While the lecture method pervaded many schools well into the twentieth century, publishers, authors, deans, and professors increasingly moved student preparation from treatises to casebooks. Treatises became longer and more unwieldy, leading to a common bifurcation of the treatise—a multi-volume reference work with a single-volume student reference.²⁴⁰ By mid-century, neither was commonly employed as a primary text for student course preparation.²⁴¹

The assignment of treatises coupled with the delivery of monologue lectures is now a true rarity.²⁴² There remain a few classes in which the course is taught from a treatise, such as Philip Kissam's constitutional law course in the University of Kansas.²⁴³

It thus comes as no surprise that a survey conducted in conjunction with the writing of this Article in 1995 ("the 1995 survey") suggests that the treatise and the monologue have been nearly abandoned in the lecture hall.²⁴⁴ The survey was distributed through the deans of the ABA-accredited schools to the 5,052 full-time law professors then teaching in those schools. There were 513 responses, of which 422 related to traditional lecture hall courses.²⁴⁵ Of these respondents, only 3% (13) used a treatise as the "primary assigned text."²⁴⁶ When asked how much of a class is spent in dialogue or monologue,²⁴⁷ no respondent used monologue exclusively; 11% (46) were "mainly monologue," 38% (160) were "roughly equal," 45% (190) were "mainly dialogue," 3% (13)

239. See *id.*

240. See, e.g., McCormick on Evidence (Edward W. Cleary ed., 3d ed. 1984) (student hornbook); McCormick on Evidence (Edward W. Cleary ed., 2d ed. 1972) (multi-volume reference).

241. See *infra* notes 349-370 and accompanying text.

242. The effect of the treatise's decline on scholarship is significant, particularly in areas of law in which "learned treatises" are recognized sources of positive law. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632 (1981); Thomas M. Franck, *Review Essay: The Case of the Vanishing Treatises*, 81 Am. J. Int'l L. 763 (1987) (book review).

243. See Philip C. Kissam, *Teaching Constitutional Law Differently*, 9 Const. Commentary 237 (1992). Professor Kissam's students study primarily from Laurence H. Tribe's treatise, *American Constitutional Law* (2d ed. 1988).

244. The results of the study are on file with the author.

245. The inferential utility of the survey is limited by imprecision in distribution through third parties and the allowance of professors to submit multiple responses when one professor teaches different courses. As a practical matter, few professors did submit two forms and fewer still submitted more than two. Even so, the responses are considered by the author to be suggestive.

246. Question 43: "Is your primary assigned text best described as a—(1) Casebook (2) Treatise (3) Problem book."

247. Question 87: "Is your average class primarily monologue lecture or dialogue with students? (1) all monologue (2) mainly monologue (3) roughly equal (4) mainly dialogue (5) all dialogue."

responded "all dialogue." It would seem from this response that the treatise and the monologue are rare birds indeed. The few courses in which the lecture method has not utterly lost its hold tend to be in areas in which student readings are based on academic texts rather than cases, such as legal history and jurisprudence.²⁴⁸ In the rest, the field has been occupied primarily by the casebook.

III. THE CASEBOOK AND THE CASE METHOD

The most common texts for classroom instruction at the close of the twentieth century are casebooks. Although classroom methods have become increasingly diverse and despite a rise in the use of other text formats—particularly the problem book—the casebook has now held its prime place for a century.

Corresponding to the casebook is the dialogue as the principle mechanism of pedagogy, designed to elicit understanding of the cases from the students. The depth and focus of this discussion may vary widely, and yet the idea of dialogue continues, with its attendant benefits of continuous evaluation and correction and its corresponding detriments of less-discernable organization and student self-consciousness.

The essence of the case method, as created by its progenitor and promoters at Harvard, is to heighten student understanding of the nature of law, not just to train students in the content of the rules. Such a change was, perhaps, inevitable, as the understanding of law changed from Georgian certitude of Newtonian universalism to the Victorian conceptions of progress and system, promoted by the likes of Jeremy Bentham and Herbert Spencer. If man could be the measure of all things, then understanding the science of law meant to understand what men did with it, not merely cataloguing its rules.²⁴⁹ The rules could be used to bring order on society and to interject rationalism toward scientific ends. That being the case, the rules could then be evaluated according to how well they accomplished those ends. The case, the moment the rule was applied in a court, was the best experimental result for both ascertaining the true meaning of a rule and measuring its effect.

There is doubt that the casebook is the best vehicle to accomplish this "scientific" end, which has nipped at the casebooks' heels from the start. The efficacy of case method teaching, even when done well, has often been disputed, and it is certainly not always done well.

248. See, e.g., Steve Sheppard, *The Case for Expanding the Jurisprudential Tent*, *The Law Teacher* 5 (October 1996).

249. See Simpson, *supra* note 242, at 677. For a view that the pursuit of such an understanding by the case method is inherently modern, see Thomas L. Grey, *Langdell's Orthodoxy*, 45 *U. Pitt. L. Rev.* 1 (1983).

A. *The Casebook: Its Predecessors*

The idea that students should learn the law from reading the cases is an idea far older than American legal education, and it has never been completely out of fashion. The *Year Books*, compilations of legal debates from the thirteenth century until 1535,²⁵⁰ were initially copied manuscripts, first printed around 1480.²⁵¹ Long the essence of study for students of the Inns of Court,²⁵² the *Year Books* were not supplanted by reports until the 1500s.²⁵³ The sixteenth century reports of Dyer,²⁵⁴ Coke,²⁵⁵ and Plowden²⁵⁶ were originally written for the private use of the reporters and only later bound and published.²⁵⁷ Even so, the reports soon became an essential tool for both lawyers and students,²⁵⁸ remaining a focus of the young scholar's attention long after treatises and commentaries became widespread.²⁵⁹ This is not too surprising as the lawyers who were the early reporters were not as much recorders as they were journalists and interpreters, sometimes presenting as much of their

250. See, e.g., *Les Reports des Cases Argue & Adjudge in le temps del' Roy Edward le Second, et ausy Memoranda del' Exchequer en Temps le Roy Edward le Primer* (Richard de Winchedon ed., London, George Sawbridge, William Rawlins & Samuel Roycroft 1678). English translations are in the Selden Society series. See, e.g., *Year Books of Edward II*, Vol. XXVI (Part I), *The Eyre of London*, 14 Edward II, A.D. 1321, Vol. I (Helen M. Cam ed., Selden Society 1968) (1321).

251. See William C. Bolland, *The Year Books: Lectures Delivered in the University of London at the Request of the Faculty of Laws* (1921); Charles C. Soule, *Year-Book Bibliography*, 14 Harv. L. Rev. 557 (1901).

252. See Lemmings, *supra* note 8, at 102.

253. Bacon was so accustomed to the year books, and so unlikely to commend the work of his rival, Coke, that he declared, "[T]he Common Law of England, it appeareth, is no text law, but the substance of it consisteth in the series and succession of Judicial Acts from time to time which have been set out in the books which we term Year Books." Bolland, *supra* note 251, at 22.

254. See Thomas Ireland, *An Exact Abridgment in English of All the Reports of That Learned and Reverend Judge Sir James Dyer, Knight* (London, Matthew Walbancke and John Place, 1651).

255. Edward Coke, *Les Reports De Edward Coke . . . De Dieurs Resolutions & Judgements* (London, The Company of Stationers, 1619); Thomas Ireland, *an Exact Abridgment in English, of the Eleven Books of Reports of the Learned Sir Edward Cook Knight &c., Wherein Is Briefly Contained the Very Substance and Marrow of All These Reports, Together with the Resolutions on Every Case Also a Perfect Table for the Findings of the Names of All Those Cases, and the Principal Matters Therein Contained* (London, G. Dawes 1666).

256. Edmund Plowden's *Commentaries* were published in 1571 and 1579.

257. See Holdsworth, *supra* note 7, at 364. This tradition would appear to have been copied in America. Thomas Jefferson seems to have begun collecting case reports for his own use, these being bound posthumously into a volume of reports. Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia; From 1730 to 1740; and from 1768 to 1772*. (Charlottesville, F. Carr & Co. 1829).

258. See Holdsworth, *supra* note 7, at 355-79.

259. See William Wright (attrib.), *Advice on the Study of Law, with Directions for the Choice of Books, Addressed to Attorneys' Clerks with Additional Notes for the American Student* 65 (Fred Rothman reprint 1994) (1811).

own views of both the cases and the cases' precedents as of the views of the judges. Their reports were likewise not exhaustive but were selective, representing many of the same editorial choices of significance and novelty that would later be made by casebook editors.

Students in the American colonies studied from the reports alongside institutes and commentaries.²⁶⁰ John Adams, for instance, read from English reports of Salkelds and Raymonds, along with the treatises of Wood, Coke, and Glanville.²⁶¹ The library at Litchfield was rich in American and English reports, to which students were constantly referred.²⁶² Many great lawyers, including James Madison, served as reporters in their youth.²⁶³ Lecturers from Wythe to Dwight expected students to read cases from the reports and to link principles to cases, but the cases were still secondary to the more general principles and logical relationships between them.

The first "casebooks" were really specialized reporters for the consideration of a particular practice area.²⁶⁴ In the nineteenth century, though, collections of cases, sometimes edited and annotated, were increasingly common methods of presenting the general state of the common law.²⁶⁵ Lawyers might also collect cases as extended briefs of particular issues then pending before the courts, particularly the English courts considering taxation.²⁶⁶ Such collections were common in America

260. This point is the opening salvo of Simeon Baldwin's consideration of the casebook in 1900. See Simeon E. Baldwin, *Teaching Law by Cases*, 14 Harv. L. Rev. 258, 258 (1900). For Baldwin's exposition on the need of principles prior to cases, see Simeon E. Baldwin, *The Study of Elementary Law, The Proper Beginning of a Legal Education*, 13 Yale L.J. 1 (1903).

261. See John Adams, *Autobiography of John Adams*, in 3 *The Adams Papers: Diary and Autobiography of John Adams* 253, 271 (L.H. Butterfield ed., 1962).

262. See McKenna, *supra* note 69, at 111.

263. Madison's reporting of *Paxon's Case* on the Writs of Assistance became the basis for the Fourth Amendment warrant requirement. See, e.g., the opinion of Judge William Barbour in *American Civil Liberties Union v. Mabus*, 719 F. Supp. 1345, 1353 (S.D. Miss. 1989).

264. See, e.g., John W. Willis Bund, *A Selection of Cases from the State Trials: Trials for Treason (1327-1681)* (Cambridge, Cambridge University Press Warehouse 1879); W. Hunt, *Cases on the Annuity Act (London 1794)* (Harvard Law School unclassified); Henry Nicholl, *Cases Relating to Railways and Canals, Argued and Adjudged in the Courts of Law and Equity: 1835 to 1854* (London, A. Maxwell 1840-55) (7 vols.); Anson V. Parsons, *Select Cases in Equity Argued and Determined in the Court of Common Pleas of the First Judicial District of Pennsylvania* (Philadelphia, T. & J.W. Johnson 1859-88).

265. For an example of such a casebook, see John I.C. Hare, *American Leading Cases: Being Select Decisions of American Courts in Several Departments of Law, with Especial Reference to Mercantile Law, with Notes* (Philadelphia, T. & J.W. Johnson 2d ed. 1851).

266. See, e.g., *Cases of Appellants Relating to the Duties on Houses, Windows, or Lights, with the Opinion of the Judges Thereon* (London, Office for Taxes 1786); *Cases of Appellants Relating to the Duties on Male and Female Servants, on Horses and Carriages and on Shops; with the Opinions of the Judges Thereon* (London, Office for Taxes 1787); *Cases of Appellants Relating to the Tax on Servants, with the Opinion of the Judges Thereon* (London, Office for Taxes 1781); Edward Griffith, *Cases of Supposed Exemption from Poor Rates, Claimed [by the Inns of Court] on the Ground of Extra-Parochiality, with a Preliminary Sketch of the Ancient History of the Parish of St. Andrew, Holborn* (London, H. Butterworth

as well, such as that Dwight produced from the *Rose* case.²⁶⁷

Even so, between the death of Edward Coke and 1870, no author or teacher expected students to prepare for law lectures relying *exclusively* on readings of judicial cases. All of this changed with the advent of Christopher Columbus Langdell, the new Dean of Harvard Law School.

B. Langdell and His Science

Langdell was a Harvard student from 1851 to 1853. There he had been a poverty-blighted bookworm, found always wearing his green eye-shade in the library, usually at the center of a discussion of various points of law. His capability led to work both in the library and as Parsons's assistant in preparing his *Law of Contracts*.²⁶⁸ For sixteen years after graduation, he practiced law in New York, living alone and unmarried in an apartment over the office of his firm, Stanley, Langdell, and Brown.²⁶⁹

In 1870 newly-appointed Harvard President Charles Eliot remembered having heard the student Langdell speaking with other students about the law:

I remembered that when I was a Junior in College in the year 1851-1852, and used to go often in the early evening to the room of a friend who was in the Divinity School, I there heard a young man who was making notes to *Parsons on Contracts* talk about law. He was generally eating his supper at the time, standing up in front of the fire and eating with good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given to me to

1831); George Sweet, *Cases on a Wife's Separate Estate and Equity to a Settlement out of her Equitable Property*, viz. *Scarborough v. Borman*, *Tullett v. Armstrong*, *Dixon v. Dixon*, *Nedby v. Nedby*, *Stead v. Nelson*, *Newlands v. Holmes*, and *Sturges v. Champneys*; with *Notices of the Earlier Decisions* (London, S. Sweet 1840); Thomas George Western, *Cases Relating to the Tithes of the City of London* (London, H. Butterworth 1823). For an Irish example, see *Cases with Opinions of Eminent Counsel, in Matters of Law, Equity, and Conveyancing* (Philip John Kennedy Burton ed., Dublin, H. Watts 1791-93).

267. See discussion in Sheppard, *An Introductory History*, in Closen et al., *supra* note 3. Areas of administrative regulation garnered the greatest case book and specialized reporter publication, particularly railroads. See, e.g., *Cases Relating to Railways and Canals, Argued and Adjudged in the Courts of Law and Equity: 1835 to 1852* (Boston, Little, Brown & Co. 1854); *Cases Relating to the Law of Railways Decided in the Supreme Court of the United States & in the Courts of the Several States* (Boston, Little, Brown & Co. 1854-56).

268. Rufus Choate, Langdell's contemporary, remembered him as a student:

Professor Langdell was at that time the Librarian and was assisting Mr. Parsons in getting out the notes of his work upon contracts, of which I have often thought the notes were the most valuable part. He was a tremendous student, following the system of studying the cases and not caring much about text books, which are generally of a very evanescent character. Many years afterwards he established this system at the law school as the standard one

Letter from Rufus Choate to Charles Warren (Oct. 18, 1907) (Harvard Law School, Charles Warren papers).

269. See James Barr Ames, *Christopher Columbus Langdell*, in William D. Lewis, 8 *Great American Lawyers* 465, 472-75 (1909).

understand that I was listening to a man of genius.

In the year 1870, I recalled the remarkable character of that young man's expositions, sought him in New York, and induced him to become Dane Professor.²⁷⁰

Eliot's decision was deliberate and informed. James Bradley Thayer had commended Langdell to Eliot.²⁷¹ So had George Shattuck, Oliver Wendell Holmes's future partner, although Shattuck did express some reservations concerning Langdell's "faults of manner and temper" and poor ties with the New York bar, owed in part to his "disgust with the New York courts and their general mode of doing things."²⁷² Eliot nonetheless pushed the appointment through the Harvard Boards.²⁷³ Eliot later reflected:

So he became Dane Professor. He told me, in 1870 . . . that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.²⁷⁴

Professor, and quickly Dean, Langdell's "science of law"²⁷⁵ had an essential and quickly famous foundation: knowledge of the law is best derived from its sources, the cases.²⁷⁶ A student would thus read and

270. 2 Warren, *supra* note 96, at 360-61 (quoting Charles W. Eliot, Speech at the Dinner of the Harvard Law School Association (Nov. 5, 1886)).

271. See Letter from James B. Thayer to Charles Eliot (Nov. 13, 1869), in LaPiana, *Dissertation*, *supra* note 4, at 211.

272. Letter from G.O. Shattuck to Charles Eliot (Dec. 17, 1869), in LaPiana, *Dissertation*, *supra* note 4, at 211.

273. See Charles W. Eliot, *Langdell and the Law School*, 33 Harv. L. Rev. 518, 518 (1922).

274. Warren, *supra* note 96, at 360-61 (quoting Charles W. Eliot, Speech at the Dinner of the Harvard Law School Association (Nov. 5, 1886)).

275. The idea of law as a science was by then already centuries old, but it had taken yet another turn in keeping with contemporary conceptions of the meaning of "scientific." Lon Fuller noted that Professor, later Justice, Oliver Wendell Holmes, Jr. used the term "legal science" in a manner derived from Karl Pearson's, *The Grammar of Science*, more closely than any other work. Pearson's description of the scientific method is "to marshal facts, to examine their complex mutual relationships, and predict upon the result of this examination their inevitable sequences—sequences which we term natural laws and which are as valid for every normal mind as for that of the individual investigator." Lon L. Fuller, Notes on Oliver Holmes (Harvard Law School, Lon L. Fuller Papers) (quoting Karl Pearson, *The Grammar of Science* 9 (2d ed. 1900)).

276. Langdell's most specific recorded consideration of law as science are brief remarks delivered in an after-dinner speech. See Christopher C. Langdell, *Teaching Law as a Science*, 21 Am. L. Rev. 123 (1887). Mike Hoeflich has considered the roots of Langdell's conception of science as empirical in M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 Am. J. Legal Hist. 95 (1986). The similarity and contemporaneity between this view and Holmes's view is seen in Grey, *supra* note 249 and in William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 Colum. L. Rev. 809 (1990).

consider case opinions on a given topic, and then class discussion of that topic would develop the relationship of the principles of law reflected in the case to other points of law.

The other element of Langdell's lectures in the scientific manner was to exorcize the professor's recitation of prepared notes as the sole spirit of the law in class discussion. No longer would the professor deliver to uncritical mutes the essential ideas of cases and their relationship to the topics of the course. Instead, students were to discover the significance of the cases for themselves, to examine, analyze, and critique the cases they read by engaging professors in a colloquy.

The maiden flight of Langdell's case method was the first contracts class of the fall term of 1870. The lecture was delivered in a semi-circular auditorium, with a small platform holding the lecturer's desk. From the platform radiated rows of cushioned settees beside which students could rent a small writing table from the janitor.²⁷⁷ The room was filled with an unusually large audience.²⁷⁸ A student in the class, Samuel F. Batchelder, recalled the lecture:

The class gathered in the old amphitheatre of Dane Hall—the one lecture room of the School—and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes! The lecturer [Langdell] opened his.

"Mr. Fox, will you state the facts in the case of *Payne v. Cave*?"

Mr. Fox did his best with the facts of the case.

"Mr. Rawle, will you give the plaintiff's argument?"

Mr. Rawle gave what he could of the plaintiff's argument.

"Mr. Adams, do you agree with that?"

And the case-system of teaching had begun.²⁷⁹

Langdell's method was not beloved. Batchelder continued, describing the course's reception over the term:

His attempts were met with open hostility, if not of the other instructors, certainly of the bulk of the students. His first lectures were followed by impromptu indignation meetings.—"What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion. What we want to know is: What's the Law?"

But far from telling the students, "what is the law," Langdell doggedly refused to be their touchstone, making them take the measure of the cases for themselves, no matter how much they resented the lack of guidance. Batchelder continued:

They were finding out how the law was made, and the

277. See Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 Harv. L. Rev. 493, 498 (1920).

278. See *id.*

279. Samuel F. Batchelder, *Christopher C. Langdell*, 18 The Green Bag 437 (1906).

reasons for it, and how it was applied in actual practice. The lecturer was working it out for himself with them. Every step of the reasoning was scrutinized and tested and re-examined till proved right or wrong. . . . The old professors called wholly for definitions and rules: . . . "What is the difference between an action of trespass and an action of trespass upon the case?" The new Dean presented actual problems for solution:—"If A contracts with B to serve him one year at so much per month, and at the end of six months' service he dies, will his representatives be entitled to recover against B for the six months' service; and if so, how much and upon what principle?"²⁸⁰

Of course, the students' change of role from receiver to thinker was also a great increase in student responsibility, an increase that was not much welcome, and in Batchelder's words, "dismay filled the school."²⁸¹ He wrote:

Did the new lecturer himself know the law? He apparently took back in one lecture what he had said in the last. Young Warner, a keen logician (and one of the first converts to the new system) cornered him squarely one day, amidst a hurricane of derisive clapping and stamping. Would it be believed, "the old crank" went back to the same point next day and worked it out all over again! Most of the class could see nothing in his system but mental confusion and social humiliation. They began to drop away fast.²⁸²

And drop away they did. By the end of the first term, he had lost all but seven members of his contracts audience. Moreover, along with higher tuitions, a longer course, and newly instituted examinations of both applicants and students,²⁸³ the grievous reputation of the method "undoubtedly" reduced enrollment,²⁸⁴ if only briefly.²⁸⁵

Initially, Langdell circulated his pamphlets of cases to his students. In the following year, however, he bundled them together into his *Selection of Cases on the Law of Contracts*.²⁸⁶ In his preface, Langdell made it clear that the quintessence of the casebook was merely to solve the logistical problems of access to a library of case reports. The practical difficulties of a student's access to cases,

280. *Id.* at 440.

281. *Id.* at 441.

282. *Id.* at 440.

283. For a discussion of these exams, see Sheppard, *Informal History*, *supra* note 8.

284. See 2 Warren, *supra* note 96, at 382. The number of students enrolled for the year's course fell from 138 in 1868-1869 to 117 in 1871-1872, which was the lowest enrollment since the mobilization for the civil war. See *id.* at 348, 520.

285. By 1884-1885, enrollment had reached 156, helping to bring the law school back into a fiscal surplus. See *id.* at 438.

286. Christopher C. Langdell, *Selection of Cases on the Law of Contracts. With References and Citations* (Boston, Little Brown & Co. 1871) [hereinafter Langdell, *Contracts 1st ed.*].

both while in a large class and in individual study afterwards, led him to publish "such a collection of cases as would be adapted to my purpose as a teacher."²⁸⁷ This collection was "scientifically" culled from the rapidly increasing body of cases. The science involved, however, was rather like the cataloging organization of a treatise:²⁸⁸

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of the law. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other being the cause of much apprehension. If these doctrines could be so classified and arranged so that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.²⁸⁹

However he might derive or enumerate the principles, Langdell's book was still based on understanding not the principles alone but the principles in the light of the cases that reveal them. Langdell opined:

Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study.²⁹⁰

The cases that Langdell selected to represent these principles were

287. *Id.* at vi.

288. For continental antecedents, see Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. Rev. 837 (1990). The idea of the "science of law" was taken to lengths far removed from the structure of education, befitting its long-standing role as a metaphor for jurisprudence. A series of expositions in this vein can be found in Sheldon Amos, *The Science of Law* (New York, D. Appleton 1874); Karl Gareis, *The Science of Law* (Boston, Boston Book Co. 1911) (AALS Modern Legal Philosophy Series, Vol. 1); Benjamin N. Cardozo, *The Paradoxes of Legal Science* (1928); Huntington Cairns, *The Theory of Legal Science* (1941); J.W. Harris, *Law and Legal Science: An Inquiry into the Concepts of Legal Rule and Legal System* (1979).

289. Langdell, *Contracts 1st ed.*, *supra* note 286, at vi.

290. *Id.* at vi-vii.

not limited by time or jurisdiction, except that they were from courts of the common law or of equity. Instead, his selection method was broad indeed.²⁹¹

Despite the cases' reflection of principles, the cases themselves were presented with few extrinsic hints of what principles those might be. The first edition of Langdell's book had no narrative beyond the three-page preface. There was only one student guide to the book's cases, an analytical index listing the principles in long narratives.²⁹²

In 1872 Langdell published a second casebook, *Cases on Sales*,²⁹³ which was modeled rather closely after the first edition of the contracts book. Besides the bulk of unannotated cases, there was an analytical index, but no summary. A third volume as well, his *Cases on Equity*, followed the same pattern.²⁹⁴ He also authorized the collection of his articles on equity into an essay book.²⁹⁵

Perhaps the strongest clues to Langdell's selection process are in the cases he retained or expunged in his second edition of the contracts book. In compiling the second edition, Langdell removed thirty-five of the "less important" cases from the original 346. He added twenty-four, including "several important cases which have been decided since the first edition,"²⁹⁶ as well as beefed-up sections on consideration, including sources of consideration, forbearance as consideration, and moral consideration.²⁹⁷ The majority of the cases removed relate to forbearance as consideration,²⁹⁸ a response, perhaps, to criticism in the generally favorable review of the first edition by the *American Law Review*.²⁹⁹ The

291. Langdell stated:

It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire, to study that branch of law systematically and in its original sources.

Id. at vii.

292. See *id.* at 1009-22. Of course, if the future hints of the prologue, many of Langdell's students might have remained somewhat clueless to the value of the indexes as a tool. There seem to be remarkably few references to it in his student's notes and reminiscences.

293. Christopher Columbus Langdell, *Select Cases on Sales of Personal Property. With References and Citations* (Boston, Little, Brown 1872).

294. Christopher Columbus Langdell, *Cases in Equity Pleading Selected with Special Reference to the Subject of Discovery* (Cambridge, Printed for the Author 1878).

295. Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction: Being a Series of Articles Reprinted from the Harvard Law Review* (1905).

296. Christopher C. Langdell, *Select Cases on Contracts With a Summary of the Topics Covered by the Cases* (Boston, Little, Brown, 2d. ed. 1879) [hereinafter Langdell, *Contracts 2d ed.*].

297. Compare Langdell, *Contracts 2d ed.*, *supra* note 296, at xii-xvi, with 1 Langdell, *Contracts 1st ed.*, *supra* note 286, at xv-xvii.

298. See *id.*

299. See Oliver Wendell Holmes, *Book Notices: A Selection of Cases on the Law of Contracts*, 5 *Am. L. Rev.* 340, 353 (1871), in 1 *The Collected Works of Oliver Wendell Holmes* 243 (Sheldon M. Novick ed., 1995) [hereinafter Holmes, *Collected Works*]. The second edition

bulk of the additional cases were clearly not added for their novelty, but for the introduction of principles that had been omitted from the earlier edition.³⁰⁰ Langdell presented the ideas in each subject area through cases ordered in a way that generally reflected an evolution over time. Otherwise, Langdell did not often discriminate by age or jurisdiction.

Despite the changes in the cases selected, the most radical departure of the second edition was the addition of a brief summary at the end.³⁰¹ In a later edition of the summary, which Little, Brown also issued independently of the cases, Langdell made clear that the narrative was only a summary of the law reflected in the cases in the casebook, not a summary of the field of contracts as a whole.³⁰² The summary is, though, a small treatise, truncated to narrate the issues developed in the selected cases and meant for student reference.

Of course, just as the readings had matured, so had the reaction of the students to Langdell's classes. By the end of the decade, his circle of admirers had grown both larger and more tolerant. William Schofield described Langdell and his students in the 1880 Contracts class.

He ascended the platform . . . and opened the course with a brief statement of the nature of a contract. Then he called upon some student to state the case of *Payne v. Cave* . . . This fairly broke the ice, and the students soon learned what was expected of them under the Langdell System.

. . . His dominant purpose seemed to be to bring out not only the decision of each case, but the reason for the decision. Students soon learned that any position they might advance was pretty soon to be followed by the question, "Could you suggest a reason?" This came with such frequent iteration that it was something of a by-word. . . .

Another point upon which he laid stress was the correct use of terms. We were constantly speaking of

prompted a sharper response, however: "We do not agree with [Langdell], however, in his seemingly exclusive belief in the study of cases. We should not shut our eyes to a rapid and continuous view of the principles deduced from them. And this can only be got in the text-books." Oliver Wendell Holmes, *Book Notices: A Selection of Cases on the Law of Contracts*, 6 Am. L. Rev. 353 (1871), in 1 Holmes, *Collected Works*, *supra*, at 273. The review of Langdell's book on sales, unsigned but perhaps by Gray, was much more charitable. "We have dealt on this second book of Professor Langdell's more than we intended, because we have observed in some quarters a disposition to depreciate his former book To understand fully how good these books are, the reader must be a pretty good lawyer himself." *Book Notices: A Selection of Cases on the Sales of Personal Property*, 6 Am. L. Rev. 145, 146 (1872).

300. A detailed discussion of the particular cases added or redacted is too complicated for this Article, although work along these lines may be found in LaPiana, *Dissertation*, *supra* note 4; Oliver Wendell Holmes, *Book Notices: A Selection of Cases on the Law of Contracts*, 6 Am. L. Rev. 353, 353-54 (1871); see also LaPiana, *Logic and Experience*, *supra* note 4, at 58-78.

301. Langdell, *Contracts* 2d ed., *supra* note 290, at 985.

302. See Christopher C. Langdell, *A Summary of the Law of Contracts* iii (Boston, Little, Brown & Co. 2d ed. 1880).

"offer," "acceptance," "consent," "consideration." Occasionally Professor Langdell would rap impatiently upon the desk and say, "Gentlemen, I should like a little more precision in the use of terms." He was thoroughly fair and impartial in the discussions. If a student in explanation of a case made a point that was unusually good, Professor Langdell would remember it, and sometimes give credit to the student afterwards by name when he mentioned it,—a distinction of great importance in the law school world.

It can hardly be said that Professor Langdell was a popular instructor Although he had collected a number of volumes of cases he never displayed any facility in recalling their names or in remembering the points decided in them or the facts. He seemed to take up each case in the class as if he had never seen it before. He went over all the steps in the reasoning as new work without any aid from or reliance upon memory. His method was a daily object lesson to students in thoroughness and accuracy . . . His students soon began to feel that they were not only acquiring knowledge but developing new powers. . . .

. . . .
Professor Langdell was always willing to reconsider a conclusion in the light of new suggestions. Not infrequently in new courses with which he had not become thoroughly familiar, he would recant propositions which he had advanced as sound. A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine. That he could do this without losing the respect or confidence of his students shows the esteem in which he was held.³⁰³

An interrogative approach to the classroom was certainly no innovation. Dwight and Hammond relied upon it, Parsons had experimented with it, and Greenleaf had exercised students with it. The differences, in a minor sense, were the portion of time spent on the colloquy and, in the major sense, the relationship of a student's preparation to the student's classroom performance.

Although exposing students to the organization of treatises, Langdell attempted to tear the students from rote memorization of principles set down for them by a treatise writer or professor. Instead, by providing them with the raw material from which the fine points of treatises are derived, Langdell led the students to make their own derivations. He did not so much force a particular view upon the student as force a journey of independent discovery.³⁰⁴ For this reason, Langdell chose teachers from

303. William Schofield, *Christopher Columbus Langdell*, 55 Am. L. Reg. 273, 274-77 (1907). For further analysis of Langdell's lectures based on his students' notes, see Sheppard, *An Introductory History*, in Sheppard, *Law Schools*, *supra* note 3.

304. Bill LaPiana points out that one of Langdell's greater achievements was to lead a

among able students, not merely from the ranks of practitioners.³⁰⁵

In 1870 Langdell alone employed the case method, using it exclusively in his courses in contracts and sales. His civil procedure course, however, revolved around a weekly moot court.³⁰⁶ Emory Washburn continued teaching his property course from a treatise, as did Nathaniel Holmes in Equity, Agency, Corporations, Bailments, and Conflicts; Charles Bradley in Evidence; and Nicholas St. John Green in the first Harvard class devoted to Torts.³⁰⁷ Indeed, Langdell remained sole practitioner of the case method until an influx of new faculty began to shift the tide.

James Bradley Thayer was appointed Royall Professor in 1873, adding to a faculty that then included Langdell and John Chipman Gray. Still, the most profound influence came from the 1873 appointment of Langdell student James Barr Ames as assistant professor. While the other professors continued to view Langdell's system with caution, Ames embraced it immediately. Ames, just twenty-seven years old, had taught history, German, and French in Harvard College before his appointment.³⁰⁸ At the law school, he taught contracts and sales and, later, torts and procedure.³⁰⁹

Ames was initially an acolyte to Langdell, teaching courses Langdell had taught, and using Langdell's method and book. He soon became Langdell's champion against critics and, upon Langdell's retirement, his successor as Dean. He molded and refined the case system, producing a raft of casebooks including titles in torts, commercial law, partnership, and trusts.³¹⁰ Ames refined the composition of casebooks, jettisoning

transition from the essentially sacral view of the law as received to the secular view of law as produced. See William LaPiana, *Honor Langdell*, 20 L. & Soc. Inquiry 761, 762 (1995).

305. Langdell once stated:

What qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman praetor, still less of the Roman procurator, but the experience of the jurisconsult.

2 Warren, *supra* note 96, at 361 (quoting Christopher C. Langdell, Speech at the Dinner of the Harvard Law School Association (Nov. 5, 1886)).

306. See 2 Warren, *supra* note 96, at 375, 383-84 (quoting Christopher C. Langdell's report as Dean).

307. See *id.* at 375-76.

308. See *id.* at 388; Sutherland, *supra* note 150, at 183-84.

309. See 2 Warren, *supra* note 96, at 386-90; Sutherland, *supra* note 150, at 183-84.

310. See, e.g., James Barr Ames, *Cases on Bills & Notes & Other Negotiable Paper* (Boston, Soule & Bugbee 2d ed. 1894) (with a summary of the law appended); James Barr Ames, *Cases on Suretyship* (Cambridge, Harvard Law Review Publishing Association 1896); James Barr Ames, *A Selection of Cases on the Law of Partnership* (Cambridge, John Wilson & Son 1881-87); James Barr Ames, *A Selection of Cases on the Law of Trusts* (Cambridge, Harvard Law Review Publishing Association 1893); James Barr Ames, *A Selection of Cases on Pleading at Common Law* (Cambridge, John Wilson & Sons 1875). His first book was on torts, which he had initially published privately. See James Barr Ames, *A Selection of Cases on the Law of Torts* (Cambridge 1875). Several later editions of that book were also published. See James Barr Ames & Jeremiah Smith, *A Selection of Cases on the Law of Torts* (Cambridge, Harvard Law Review Publishing Association 2d ed. 1893); James Barr Ames & Jeremiah Smith, A

Langdell's method of including the cases necessary completely to describe the evolution of a legal principle, and choosing cases for interesting facts and crisp opinions to stimulate student engagement in the cases.³¹¹

One habit of Langdell's that Ames appears to have taken to greater heights was his willingness to criticize the results reached in the opinions he discussed.³¹² While the students formed their own views of the merits of the cases, Ames expressed his views with sufficient force to guide student bias.³¹³

Besides Ames, other converts to the case method were slow in coming, although there was less reluctance among the young. Louis Brandeis, a lecturer in evidence in 1882, used a combination of lecture and case dialogue.³¹⁴ Oliver Wendell Holmes, Jr., teaching from 1881 until 1883, adopted Ames's casebook for his torts class.

With some misgivings, I plunged a class of beginners straight into Mr. Ames' collection of cases, and we began to discuss them together in Mr. Langdell's method. The result was better than I had ever hoped it would be. After a week or two, when the first confusing novelty was over, I found that my class examined the questions proposed with an accuracy of view which they never could have learned from the text books, and which often exceeded that to be found in the text books. I at least, if no one else, gained a good deal from our daily encounters.³¹⁵

Selection of Cases on the Law of Tort (Roscoe Pound ed., 1917).

311. A brief survey of the books themselves will prove this point, but it is made by others. See, e.g., Edmund M. Morgan, *The Case Method*, 4 J. Legal Educ. 379, 381 (1952) (quoting James Barr Ames, 31 A.B.A. Rep. 1025 (1907)); Rosamond Parma, *The Origin, History and Compilation of the Casebook*, 4 Am. Law S. Rev. 741, 742-43 (1922).

312. See 2 Warren, *supra* note 96, at 456-57.

313. Louis Brandeis, a student of Ames, was displeased by this habit. Sutherland, *supra* note 150, at 186. Ames's lectures began with brief introductory comments and moved quickly to case discussions of various lengths. One student frequently noted Ames's remarks in the third person, such as "Ames thinks," "Ames says," or even "Ames does not think that" in describing Ames's analysis of the rules of law in the cases. R.W. Gifford, *Notes on Contracts 1898-99 Professor Ames* (Columbia Law School treasure CU G36 noc).

314. W.H. Wade, *Notes from Brandeis's Lectures on Evidence (1882-1883)* (unpublished manuscript, Harvard Law Library no. 5008). Wade was an industrious note taker. In preparing for class, he not only tabulated the cases cited, but tabulated all of the references made to treatises in the lectures, including Best, Greenleaf, Stephen, Taylor, Wharton, at length, on Evidence, as well as Dana on International Law, Halleck's International Law, Cooley's Constitutional Limitations, Benjamin on Sales, Proffat on Jury Trials, Broom's Legal Maxims, Holmes's Common Law, Blackstone (but only for modes of trial), and eight law review articles. The 275 pages of class notes are followed by another 250 of annotations to these references.

315. Oliver Wendell Holmes, Jr., *The Use of Law Schools*, in 3 Holmes, *Collected Works*, *supra* note 299, at 474, 478; 2 Warren, *supra* note 96, at 431 (quoting Oliver Wendell Holmes, Oration at the Law School Day, Nov. 5, 1886, at the Commemoration of the 250th Anniversary of the Founding of Harvard College). Notes from a student in Holmes's Suretyship lectures suggest a similar story. Holmes drew his lectures directly from the cases. Many of the cases are introduced by comments and questions, as well as treatise references. See Alfred Mack (1882-83) Suretyship, Prof. O.W. Holmes Monday 3 to 4 P.M. (unpublished

Eventually, Gray caved in to the new method. Although he continued to produce treatises, including his famous treatise on the Rule Against Perpetuities,³¹⁶ he also compiled a six-volume casebook on property.³¹⁷

Thayer was the last Harvard teacher of the era to succumb to the case-method allure, moving toward it in the late days of the 1880s. He eventually conducted his constitutional law and evidence classes from cases and issued casebooks in both fields.³¹⁸ Thayer's books, particularly his constitutional law books, reverted to Langdell's approach, as modified by Ames. He emphasized a "genetic" approach by which one might "see a topic grow and develop," and which might aid a teacher in the one necessary attribute of good teaching—rousing the students to engage their "awakened, sympathetic, and co-operating faculties."³¹⁹ In promoting this "dephlegmatization," however, Thayer added brief narrative introductions to his sections of cases, sometimes drawn from histories or treatises.³²⁰ By 1890 the casebook was deployed in every Harvard classroom.

Thayer's classes present something of an evolutionary model for the transit of information from professor to student. His own notes, initially written more or less for a monologue lecture, offer a straight history and list of the principles of his topic.³²¹ Over time, however, additions to the notes transform them into a collection of vignettes laced together into a

manuscript, Harvard Law Library no. 4090, vol. 4).

Holmes was more accepting than of the casebook than during his first encounter with it in 1872. See Carrington, *Hail! Langdell*, *supra* note 2, at 731.

316. See, e.g., John Chipman Gray, *Restraints on the Alienation of Property* (Boston, Boston Book Co. 2d ed. 1895). Numerous editions were produced of Gray's famous treatise. John Chipman Gray, *The Rule Against Perpetuities* (Boston, Little, Brown & Co. 1886).

317. Gray both continued to produce treatises and defend the case method in his property case book through a simple criticism of the sole study of treatises: "To thrust before the eyes of a student of law the answer to the problem contained in a case is like telling a student in arithmetic the answer to his sum before he does it . . ." John Chipman Gray, *Select Cases and Other Authorities on The Law of Property v* (Cambridge, Charles W. Sever 1888).

318. See James Bradley Thayer, *Cases on Constitutional Law for the Use of the Class in Constitutional Law at the Harvard Law School, 1892-3*. (Cambridge, Massachusetts n.d.); James Bradley Thayer, *Cases on Constitutional Law: with Notes* (Cambridge, Charles W. Sever 1895) [hereinafter Thayer, *Constitutional Law*]; James Bradley Thayer, *Cases on Evidence* (Cambridge 1890) (For the use of the class in evidence at the Harvard Law School); James Bradley Thayer, *Select cases on evidence at the common law with notes* (Cambridge, C.W. Sever 1892). Thayer's work is generally considered in Jay Hook, *A Brief Life of James Bradley Thayer*, 88 Nw. U. L. Rev. 1 (1993).

319. Thayer, *Constitutional Law*, *supra* note 318, at xvii.

320. See, e.g., *id.* at 1783-86 (quoting Marshall's *Life of Washington* for historical context in the introduction to the chapter on regulation of commerce). Thayer continued, of course, to produce treatises for student use, such as his evidence manual. James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, Little, Brown & Co. 1898).

321. James Bradley Thayer, *Lecture Notes* (James B. Thayer Papers, Harvard Law School Special Collections).

whole.

The effect of the lecture delivered from Thayer's notes is evident from the class notes of his son, Ezra, who took his father's newly-restructured class in 1891.³²² The young Thayer's notes have many corrections, with large areas of each lecture marked over as initial impressions as the thrust of the discussion changed. There are marginal annotations in a later hand that suggest revisions and enlargements made during reviews. They are a mess. Still, they evidence personal involvement in the lectures and reflect the care with which the student was required to "fathom the depths of the subject before him."³²³ This conclusion accords with a description of the lecture method offered by an anonymous Harvard student of the time to the Columbia law student newspaper:

When a case has been stated to the class, discussion is freely encouraged under the direction of the instructor. The mere *ipse dixit* of the court is never accepted as final. In fact chief justices and chancellors are frequently overruled with surprising nonchalance.... [The student] has worked out legal principles in precisely the same way in which [text writers] have worked them out. He has studied law in the very sources of law.... If the student has done his work well he will not become a mere "case lawyer." This point needs to be carefully emphasized in order to dispel the usual charge against the Harvard method. Cases are not studied as if they were so much legal am[m]unition. The student may forget his list of authorities, but he will not be likely to forget the conclusion to which these authorities have led. He has gained an insight into the way law grows... when he has a case to handle, he approaches it at the right end.³²⁴

Even as Langdell's colleagues were converting to his approach, he was obliged to abandon his beloved case method. His health was weakening and his ever-troublesome eyesight had grown too poor to see the students; soon after 1880 he reverted from case discussions to a monologue.³²⁵ By 1878 Langdell had already changed the classes somewhat, and he would sometimes introduce a case by posing a series of problems that the case might solve. His discussion commenced with principles from treatises before discussing the case at hand.³²⁶ He would also present longer or more complicated cases by monologue, the method still preferred by at least one of his stronger admirers.

Professor Langdell's sight was somewhat defective....

322. See Ezra Thayer, *Constitutional Law* (1890-91) (Ezra Thayer Papers, Harvard Law School Special Collections).

323. Samuel Williston, *James Bradley Thayer*, 15 Harv. L. Rev. 599, 607 (1902).

324. M, Letter to the Editors, 1 Colum. L. Times 24, 25 24-25 (1888).

325. See Schofield, *supra* note 303, at 55.

326. See generally Eugene Wambaugh, Langdell's notebooks (Harvard Law School manuscript 4074).

and, as it increased he gradually abandoned his method of instruction. He finally abandoned the Socratic method and stated and analyzed the cases himself. He occasionally did this in dealing with complicated cases long before he adopted it as a practice. . . . On such occasions Professor Langdell's students were treated to unrivaled exhibitions of analytical power. Everything pertaining to the case was laid bare, and all collateral and allied topics were fully discussed. This method of teaching by the Langdell System has advantages over the Socratic method. It enables the instructor to expound the whole case. . . . On the other hand, in a course . . . in which the students take part it is practically necessary to limit the consideration of each case to the point which is the subject of the particular course.³²⁷

In his last days, Professor Langdell's vision had left him sadly limited; he worked at a reserved library table, piled high with foolscap and an inkwell "at which he used to make desperate jabs with a pen, not always successfully. . . . The boy who renewed the ink was instructed to put very little ink in Prof. Langdell's inkwell."³²⁸

In many ways, Langdell was a thwarted messiah from whom later prophets built a religion. Ames, Gray, Williston, and other Langdell disciples quickly became the new standard-bearers, both articulating the strengths of case method instruction and subtly altering it in the process. Even if Langdell's parabolic career left him personally beyond the limelight, he often would be invoked by Ames and others in their prosteletyzing of the case method. Ames continued as dean until 1909, by which time the casebook was a fixture on the American landscape.

C. *The Export of the Case Method*

Casebooks and the case method swept through American law schools with rare speed. In one generation, they effectively supplanted the treatise and lecture as the dominant tools of law teaching. The prophets who spread the new religion were the students and faculty who traveled from Harvard across the land.

The case method immediately roused attention from other universities, although most of it was truly hostile. In 1872 Boston University opened a new law school under the direction of Harvard expatriate Nicholas St. John Green, as a refuge from the "particularly technical and historical" instruction across the river.³²⁹ Langdell's emphasis on cases was not completely repudiated, however. Despite the vitriol from Boston's Kenmore Square, casework there remained an important part of the

327. See Schofield, *supra* note 303, at 55.

328. Letter from Robert Anderson (Librarian at Harvard) to Dean Landis (Feb. 24, 1938), (Harvard Law School, Papers of Robert B. Anderson).

329. George R. Swasey, *Boston University Law School*, 1 The Green Bag 55, 55 (1889). Chronicles of the polemical resistance against Langdell's method can be found in Carrington, *Hail! Langdell*, *supra* note 2, at 739.

opposing pedagogy.³³⁰ The centerpiece in B.U.'s treatise-driven curriculum was the treatises of its professor from Tennessee, Melville Bigelow. Bigelow's collection of books was meant both to give an understanding of concepts and to guide the student through the cases.³³¹ "[T]he student should therefore take [them] with him to his laboratory, the law library, and there carry on his work. He should [see] the cases given in the text as examples, and go as much further into the Reports as possible."³³²

The public hostility to Langdell's method shown in Boston, however, was not universal. One of the first migrations of the case method was to Iowa, in the bags of a young Harvard lawyer, Eugene Wambaugh. Wambaugh graduated from Langdell's school in 1880 and practiced in Cleveland, Ohio, until 1889. He then began his teaching career, using the case method at the State University of Iowa from 1889 to 1892. While at Iowa, Wambaugh wrote *The Study of Cases*, an introductory casebook which was sometimes constructed as a student workbook, an interleaved book alternating blank pages and pages of text.³³³ Wambaugh left the following year to take up an appointment as Professor at Harvard, exercising considerable influence elsewhere in academic appointments.³³⁴

In 1905 North Dakota Professor Roger Cooley compiled *Brief Making* for West Publishing, including a section of Wambaugh's work from *Study of Cases*. *Brief Making* is a thorough, if dull, exploration of the process of redaction of elements from the cases of casebooks, as well as elementary legal research.³³⁵ He advised students to read every case at least twice.

The student should begin by reading the case rather

330. One method of the B.U. instructors was to print syllabi including lists of cases along with citations to treatises. See Jabez Fox, *A Syllabus of the Course in Evidence Prepared for the Use of Students in the Boston University Law School* (Boston, Boston University Press 1899).

331. Bigelow wrote treatises and casebooks, as well as scholarly monographs. See, e.g., Melville M. Bigelow, *Elements of Equity* (Boston, Little, Brown & Co. 1879); Melville M. Bigelow, *Elements of the Law of Torts: For the Use of Students* (Boston, Little Brown, 4th ed. 1891) [hereinafter Bigelow, *Elements of Torts*]; Melville M. Bigelow, *History of Procedure in England From the Norman Conquest 1066-1304* (Boston, Little, Brown & Co. 1880); Melville M. Bigelow, *The Law of Bills Notes and Cheques* (Boston, Little, Brown & Co. 1880); Melville M. Bigelow, *The Law of Estoppel* (Boston, Little, Brown & Co. 1872); Melville M. Bigelow, *Law of Fraud* (Boston, Little, Brown & Co. 1890); Melville M. Bigelow, *The Law of Torts* (2d ed. 1903); Melville M. Bigelow, *Leading Cases on the Law of Torts* (Boston, Little, Brown & Co. 1875); Melville M. Bigelow, *Placita Anglo-Normannica* (Boston, Soule & Bugbee 1879).

332. Bigelow, *Elements of Torts*, *supra* note 331, at v.

333. See Eugene Wambaugh, *The Study of Cases: A Course of Instruction in Reading and Stating Reported Cases, Composing Head-Notes and Briefs Criticizing and Comparing Authorities, and Compiling Digests* (Boston, Little, Brown and Co. 1891). This construction is similar to that used in the New York Law School syllabi. See *supra* note 217. An important legacy of Wambaugh's work, both at Iowa and at Harvard, was the greater methodization of student use of casebooks. See, e.g., Emlin McClain, *Law Department of the State University of Iowa*, 1 *The Green Bag* 374, 384 (1889).

334. See 2 Warren, *supra* note 96, at 448. For a biographical look at Professor Wambaugh, see Felix Frankfurter, *Eugene Wambaugh*, 54 *Harv. L. Rev.* 1 (1940).

335. See Roger W. Cooley, *Brief Making and the Use of Law Books* (5th ed. 1926).

rapidly from end to end, his purpose being to get a general idea of the purport of the case. He should then read the case again, looking up in a law dictionary or elsewhere the meaning of all abbreviations, technical words, and obscure expressions, not stopping until he is sure that he understands the whole case The chief things the student seeks are the points presented to the court whose opinion is reported and the propositions of law for which the decision is authority. Having made up his mind as to these matters, the student should next, with the book open before him, state the case orally, omitting none of those facts as to the pleadings, the evidence, or the procedure, which may be necessary to show what the points were and how they came before the court whose opinion is reported, and finally giving the result and the reasons upon which the court relied. He should then write a head-note containing the points of law for which the decision is authority, omitting *dicta*. He should then test the accuracy of his head-note in every possible way, attacking it as an enemy might. Finally, he should consider whether the decision is right and whether it conflicts with other decisions to which he has access.³³⁶

His instructions continue for forty pages, and the remainder of the book contains sample cases in contracts.

Another export from Iowa was William Gardiner Hammond, the compiler of the first Iowa Digest and, for a time, the only full-time teacher in a private law school, which became the law department of the State University.³³⁷ Hammond was a student of history and classics at Amherst and of law at Heidelberg, Germany. He read for the law in the chambers of Brooklyn lawyer Samuel E. Johnson and was familiar with Langdell's case method, but was far from a slavish devotee. At the Iowa law school from 1869 to 1881, and then as dean at Washington in St. Louis until 1894, he used an independent style of teaching that was similar to Langdell's but also somewhat continental. He

336. *Id.* at 1-2.

337. See William G. Hammond, Digest of the Decisions of the Supreme Court of the State of Iowa: from the close of the year 1859 to the June term, 1866 (Des Moines, Mills & Co. 1866); Emlin McClain, *William Gardiner Hammond*, in William D. Lewis, 8 Great American Lawyers 191 (1909). Professor McClain, himself a fixture in Iowa, noted in Hammond-like terms in a brief treatise that "lectures alone constitute a very unsatisfactory method of imparting elementary instruction in law This outline then is intended to enable the student to acquire by collateral study of a fuller, more accurate and systematic knowledge than he could get from oral lectures and hasty notes." Emlin McClain, *Outlines of Criminal Law and Procedure for the Use of Students* (Iowa City, Published by the Author 1883) [hereinafter McClain, *Outlines*]. For further examples of this outline approach, see Richard, Lord Acton & Patricia Nassif Acton, *To Go Free: A Treasury of Iowa's Legal Heritage* (1995); Emlin McClain, *Synopsis of the Law of Bailments and Pledges* (Iowa City, University of Iowa 1890); Emlin McClain, *Synopsis of Lectures on Remedial Law* (Iowa City, University of Iowa 1889).

used lists of cases to be read in the library rather than casebooks, and he quizzed students and discussed their findings with them during class, as well as requiring that students pass an annual examination.³³⁸ He apparently designed the dialogues to elicit considerable critical understanding, not merely rote recitation of principles, a characteristic of Hammond that paralleled his scholarship on the origins of law and its interpretation.³³⁹

Meanwhile, Columbia Law School in 1890 had hired away another Langdell student, William A. Keener, who had succeeded Holmes as the Story Professor.³⁴⁰ He imported the method into the Kent Hall faculty and wrote his own casebooks,³⁴¹ as well as defending the case method's promotion of reasoning skills in arguments within the new Section of Legal Education of the American Bar Association.³⁴²

In 1895 Case Western Law School, then three years old, hired Evan Harry Hopkins as its first resident dean. Hopkins, a Langdell student, graduated from Harvard Law School in 1892, and imported the case method to Cleveland.³⁴³ The Langdell influence grew strong even among Case's non-Harvard teachers. In 1921 the twelve faculty members all assigned readings from Harvard casebooks, except for the lecturer in bankruptcy, Austin V. Canon, who still required discussion of certain select

338. See McClain, *Outlines*, *supra* note 337, at 220. Hammond's exam, which is one of the earliest annual exams in the country, is described in Sheppard, *Informal History*, *supra* note 8.

339. See, e.g., William Blackstone, *Commentaries on the Laws of England* (William G. Hammond ed., San Francisco, Bancroft-Whitney, Co. 1890); William G. Hammond, *The System of the Roman Institutes in Its Relation to That of Hale and Blackstone*, Prepared as an Introduction to the First American Edition of Sander's Institutes of Justinian (Chicago, Callaghan & Co. 1876); Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics*, with Remarks on Precedents and Authorities, with the Author's Last Corrections and Additions, and Notes by William G. Hammond (St. Louis, F.H. Thomas & Co. 3d ed. 1880); Thomas C. Sandars, *The Institutes of Justinian; with English Introduction, Translation, and Notes* (Chicago, Callaghan & Co. 1st American, from the 5th London ed. 1876) (with an introduction by William G. Hammond). For a careful discussion of Hammond's study of Lieber's work, and his role in sustaining the study of hermeneutics, see Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 *Cardozo L. Rev.* 2135 (1995). Lieber's work is chronicled at Johnathan S. Henes, *A Lieber Bibliography, with Annotations*, 16 *Cardozo L. Rev.* 2321 (1995). Perhaps as a result of the studies, Hammond introduced a new course devoted solely to Torts, as opposed to Municipal Law or Personal Actions. See Helen S. Moylan, Note, *A Manuscript Record of the Early Days of the Iowa Law School*, 22 *Iowa L. Rev.* 108, 110 (1936).

340. See Goebel & Howard, *supra* note 104, at 136-58; 2 Warren, *supra* note 96, at 444.

341. See, e.g., William A. Keener, *A Selection of Cases on Equity Jurisdiction* (New York, Baker, Voorhis & Co. 1895-98); William A. Keener, *A Selection of Cases on the Law of Contracts* (New York, Baker, Voorhis & Co. 1898); William A. Keener, *A Selection of Cases on the Law of Private Corporations* (New York, Baker, Voorhis, & Co. 1898); William A. Keener, *Selection of Cases on Quasi-Contracts* (New York, Baker, Voorhis & Co. 1898).

342. See William A. Keener, *The Inductive Method in Legal Education*, 17 *Am. L. Rev.* 487 (1894).

343. See C.H. Cramer, *The Law School at Case Western Reserve University: A History 1892-1977*, at 38 (1977).

cases.³⁴⁴ At Wisconsin in 1895, a persistent associate dean and Wisconsin graduate, Charles Noble Gregory, convinced his recalcitrant superior, Dean Edwin E. Bryant, that the lecture, while easier on the professor, did not serve the student's needs.³⁴⁵

The University of Chicago Law Department reemerged from the Union College of Law as an independent program in 1902 amidst intense ideological struggles involving Langdell disciple Joseph Beale and Chicago scholar Ernst Freund.³⁴⁶ After much wrangling, Beale was lent to Chicago from the Harvard faculty, bringing the case method to his courses at Chicago.³⁴⁷ He was joined there by James Parker Hall, another Harvard graduate, who had taught at Stanford before becoming dean at Chicago in 1904.³⁴⁸

Of course, the case method coexisted in most schools for many years with the Dwight system, Pomeroy books, the Yale method, and other variations on the treatise and lecture method. In an 1893 law school census, only Columbia and Harvard thoroughly employed the case method.³⁴⁹ Twelve schools reported study from both treatises and either case books or leading cases in the reports, and thirty-six schools reported using textbooks exclusively, either as the basis of lectures or of student recitation.³⁵⁰ Even so, the spread of the case method was soon to gain

344. Albert M. Kales, *Legal Education in Cleveland* 5 (1921). Another program that opened in the dawning days of the casebook, which quickly embraced it, was Cornell's. See Rudolf B. Schlesinger, *The Cornell Law School's Birth and Its March to Greatness: A Rambling Centennial Tribute*, 73 *Cornell L. Rev.* 1262, 1267 (1988); see also material collected and cited at *id.*, n.2.

345. Bryant's opinion on the topic was that

[l]ectures upon a topic of law are admirable when delivered to old, trained lawyers. They can take it all in, and perceive the treatment of the subject. The mere beginner, however, but little read in legal principles and untrained in legal methods of thinking carries away but little from the best and clearest thinking The lecture system alone is of aid to the reading, thinking, eager student, with a habit of perfect attention; but with the majority of law students it is of comparatively small value.

William Robert Johnson, *The University of Wisconsin Law School, 1868-1930*, at 134-40 (1972) (unpublished Ph.D. dissertation, University of Wisconsin) (quoting Edwin E. Bryant, *Legal Education*, 2 *Reports of the Wisconsin Bar Assoc.*, 141 (1895)). A detailed treatment of Wisconsin's transition to the Socratic method is in William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* 83-179 (1978).

346. See Frank L. Ellsworth, *Law on the Midway: The Founding of the University of Chicago School of Law* 74-77 (1977). The arguments related to the initial curriculum and the coming of Beale are presented in David S. Clark, *Tracing the Roots of American Legal Education—A Nineteenth Century German Connection*, 51 *Rabels Zeitschrift* 313,332 (1987), reprinted in Sheppard, *Law Schools* *supra* note 3.

347. See Ellsworth, *supra* note 346, at 74-77.

348. See Howard Bromberg, *Legal Legacies: A Brief History of the Stanford Law School*, *Stanford Mag.* (Sept. 1993); John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 *J. Legal Educ.* 311, 314 (1985).

349. See U.S. Bureau of Educ., *supra* note 66.

350. See *id.*

pace.

Northwestern came under the sway of Nathan Abbott, a case method devotee who became dean at Stanford in 1895, and Harvard "legal missionary" Henry Wigmore, who served as Northwestern's dean from 1901 to 1929.³⁵¹ Wigmore imparted the Harvard method of casebooks, and although his influence was moderated throughout those years by the continuing influence of Freund's lecturing styles,³⁵² Wigmore reported that "all members of the faculty were believers" in the case method by 1902.³⁵³

Other holdouts persisted. At the University of Missouri, deans educated at Columbia, beginning with Christopher Tiedeman in 1879 and continuing in a succession until 1904, promoted Dwight's system. Even the 1904 decanal appointment of Eldon James, a casebook enthusiast from the University of Cincinnati, did not lead the case method to hegemony.³⁵⁴

The creation of new schools and the hiring of new deans were only two reasons for the spread of the case method. Some schools found it a natural transition, led by an ongoing national debate and the appointment of young professors. Notre Dame moved from an "eclectic" style, including dictated notes of digests, preparation of answers to questions, and recitation of briefs from cases, to the case method around 1905.³⁵⁵ The 1906 return to Tulane of two New Orleans natives from schooling in the land of the casebook, Monte M. Lemmann from Harvard and Ralph Schwartz from Columbia, led to the adoption of the casebook as well as the introduction of Harvard courses, such as Torts and Agency.³⁵⁶

Still, at the turn of the century, decanal appointments were often the means of instilling case method teaching in any school. In 1909 the first Dean of Law at the University of Oklahoma at Norman, Julien C. Monnet, was a protégé of Eugene Wambaugh and a Harvard graduate. Unsurprisingly, he built the school around a Langdell curriculum.³⁵⁷

Similar stories describe the transition of most American law schools. All other factors being equal, the case method seems to have spread more quickly among schools that sought to identify themselves as elite, so that accredited schools were likely to adopt casebooks long before unaccredited schools in the same region.³⁵⁸

351. *See id.*

352. *See* Rahl & Schwerin, *supra* note 175, at 20.

353. Henry Wigmore, Letter of Transmission to the President of the University (Sept. 15, 1927).

354. *See* William F. Fratcher, *The Law Barn: A Brief History of the School of Law, University of Missouri-Columbia* 51, 57, 92 (1978).

355. *See* Philip S. Moore, *A Century of Law at Notre Dame* 24-27 (1969).

356. *See* Wisdom, *supra* note 186, at 7. A similar story is told at Indianapolis, which moved to the case method between 1899-1916, under the influence of faculty secretary James Rohbach. *See* Ronald W. Polston, *History of the Indiana University School of Law-Indianapolis*, 28 *Ind. L. Rev.* 161, 175 (1995) (citing 2 *Courts and Lawyers of Indiana* 482-83 (1916)).

357. *See generally* Dave R. McKown, *The Dean: The Life of Julien C. Monnet* (1973).

358. *See* Herschell W. Arant, *A Survey of Legal Education in the South*, 15 *Tenn. L. Rev.* 179

Of course, the spread of the case method like Kudzu through American law schools cannot be solely attributed to academic appointments or politics. As Paul Carrington has rightly mentioned, another particularly significant reason the case method was a resounding success was that it allowed for an exciting form of moral education.³⁵⁹ In addition to its political draw, the case method quickly advanced across the landscape because with it, a skilled practitioner could deliver a memorable exercise in legal training and education.

The faster adoption of the case method at more exclusive schools led to concerns in the years after World War I that it was elitist. This charge, easily leveled at Harvard, Columbia, and other schools who early promoted the casebook, was crystallized in reports written for the Carnegie Foundation by Joseph Redlich in 1914³⁶⁰ and Alfred Reed in 1928.³⁶¹ Redlich and Reed did not suggest that the case method was inherently unsuccessful. Rather they argued that the method was effective where employed, in better schools, and contributed to a perceived divorce between the best and the worst legal educations. As a result of these reports, and the debate that followed them in the American Bar Association and the American Association of Law Schools, greater uniformity of national standards evolved—uniformity premised on the acceptance of the case method.³⁶²

By the middle of the twentieth century, the casebook and case method dialogue were the dominant tools of the American law school. There were famous holdouts, such as New York Law School and the University of Virginia, and in most schools a fraction of the faculty used methods other than the case method. Even so, the books of the case method, especially casebooks in specialized fields, have persisted as the most common basis for student preparation even in courses not taught using the case method.

Much of the success of the case method system resulted from the rich library of casebooks that quickly became available. Printed casebooks made case method courses replicable: an able instructor could effectively copy the broad structure of a course already developed elsewhere, even if the later instructor had never seen the original course. All that was needed was an understanding of the law, the case method, and the proper books. Thus, a migrant professor from Harvard, armed with a bevy of casebooks in all disciplines, could quickly transform an entire curriculum.

(1938). Indeed, unaccredited and part-time schools were likely to avoid the case method, and were encouraged to avoid it by the voices of the elite schools, because the case method required greater time in student preparation and skill in the instructor than did treatise-based lectures. See Reed, *supra* note 4, at 382.

359. Letter from Paul Carrington to Steve Sheppard (April 8, 1996).

360. Joseph Redlich, *The Common Law and the Case Method*, Carnegie Found. Rep. for the Advancement of Learning No. 8 (1914).

361. Reed, *supra* note 4, at 382.

362. See Stevens, *supra* note 4, at 112-30.

Such a bevy there was. Within thirty years of Langdell's premiere casebook, casebooks had been developed for nearly every course then offered, including contracts, quasi-contracts, property, trusts, wills and decedents' affairs, torts, constitutional law, municipal government, criminal law, equity, suretyship, pleading, evidence, damages, transportation, insurance, agency, corporations, partnership, commercial paper, sales, and admiralty.³⁶³ Langdell's colleagues wrote the earliest casebooks, but authors were soon compiling casebooks across the country. Besides tapping into the increasingly national and international markets,³⁶⁴ professors continued to develop and employ materials for use only in their own classes.³⁶⁵ According to Joseph Redlich, eighty-six casebooks had been published by 1908.³⁶⁶ Between the wars, the stream of casebooks flowed steadily and unceasingly. Nearly a hundred books per year were reviewed,³⁶⁷ prompting concerns that there was no coordination of such a vast productive effort, and thus little progress of quality in either the law or its teaching.³⁶⁸ The transition was so fast and thorough that West's casebooks issued in 1908 began with a defense of case study. West abandoned this practice in 1915 as unnecessary in the face of a friendly U.S. Bureau of Education report finding that "the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case."³⁶⁹

While most of the new books followed Ames's modification of Langdell—delivering the gist of selected principles with the most engaging cases from American and English reports—concern grew that the principles were not presented in sufficient detail. In 1908 this concern led to West Publishing's American Case Book System,³⁷⁰ designed to provide "training and knowledge" and to "cover the general principles of a given

363. Citations to examples of all these works are given in excruciating detail in Sheppard, *An Introductory History*, in Closen et al., *supra* note 3.

364. The earliest English example of a casebook for student use seems to be Gerard B. Finch, *A Selection of Cases on the English Law of Contract*, Prepared as a Text-book for Law Students in the Universities (London, C.J. Clay & Son 1886).

365. See, e.g., James Barr Ames, *A Selection of Cases on the Law of Trusts with Notes and Citations* (Cambridge, Harvard Law Review Publishing Association 2d ed. 1893); Yale Law School, *Cases on Wills* (n.d.) (Harvard Law School Library unclassified); University of Minnesota Law School, *Cases on Wills and Descent* (1923); *A Selection of Cases for Study in the Course in Contracts, with Parallel Citations: For Use of Students in the Boston University Law School* (Boston, Boston University 1899).

366. See Redlich, *supra* note 360, at 49.

367. See Albert Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 Geo. L.J. 224 (1944).

368. See, e.g., Karl Llewellyn, *On the Problem of Teaching "Private Law,"* 54 Harv. L. Rev. 775 (1941); Roscoe Pound, *Taught Law*, 37 Rep. of the A.B.A. 975 (1912).

369. William R. Vance, *Preface* to 1 Harry A. Bigelow, *Cases on the Law of Property* v (1917).

370. See, e.g., William E. Mikell, *Cases on Criminal Law* (1908).

subject in the time allotted, even at the expense of a considerable sacrifice of detail."³⁷¹ Toward this end, the ABS books were long—property took four volumes—and included shorter excerpts from cases and occasional excerpts from treatises.

Taking the idea of more general coverage to logical extremes, schools began to promote casebooks directed to a complete rendition of the laws of given states,³⁷² a move forecast and supported by Albert Kales³⁷³ and Arthur Vanderbilt.³⁷⁴ The more common methods of increasing coverage were to reduce the percentage of a case reproduced, allowing more cases per book, to include more footnotes, annotations, and text notes, and to lengthen the book.³⁷⁵ Many of these annotations were used not just to increase coverage, but to replace some of the structure of the treatises as a framework for student understanding of the cases.³⁷⁶

371. Parma, *supra* note 311, at 743 (quoting James Brown Scott, general editor of the American Case Book Series, in the prefaces to the casebooks from 1905 to 1908).

372. See, e.g., Roscoe Pound, *Cases on Practice: Select Cases and Other Authorities on Procedure in Civil Causes with References to the Code and Decisions of Nebraska* (Lincoln, T. North 1904); University of Minnesota Law School, *Cases on Extraordinary Legal Remedies* (1914); University of Minnesota Law School, *Cases on Mortgages* (Minneapolis, University of Minnesota Law School 1921); George Vaughan, *Cases on Land Titles* (Fayetteville, University of Arkansas 1938); Sam Bass Warner, *Cases on Forms of Action in Oregon* (Undated) (Harvard Law School Library unclassified); Sam B. Warner, *Cases on Oregon Pleading* ([1925?]) (Harvard Law School Library unclassified).

373. See Albert M. Kales, *The Next Step in the Evolution of the Casebook*, 21 Harv. L. Rev. 92, 92 (1907).

374. Judge Vanderbilt's argument is persuasive, if based on a somewhat thin representation of case-method instruction:

I wonder if [students] realize that the body of law which they evolve from their casebooks with decisions drawn from many states, is not the law of any single jurisdiction at all. I am not criticizing the casebooks which provide the materials to aid the search for the true principles of law . . . I am venturing to suggest, however, that some day the student will be called upon to practice in a particular jurisdiction and that he will then have to know the law of that jurisdiction. If eventually, why not now? There is no sound reason why the graduates of our law schools should spend the first three or four years of their practice, which might be devoted to more pressing matters, in discovering for the first time wherein the law of their state differs from the law of their classroom . . . I am unalterably opposed to having the instructor spoon-feed the law of a particular state to him. I would have the student do this comparative work privately. On the other hand, the instructor must be prepared . . . to learn many new things . . . [h]e will no longer be able to pontificate. The effect of this widened discussion on the work of the classroom is electric. Instructor and pupil inevitably become fellow students searching together for the true principle of the law. It is the best antidote that I know of for the evil practice, current, I fear, in too many law schools, of bequeathing the professor's notes from one generation of law students to another.

Arthur Vanderbilt, *Trends in Pre-Legal and Legal Education*, in *Proceedings of the Symposium on Legal Education at Vanderbilt University, Held at the School of Law in Connection with the Inauguration of Oliver C. Carmichael as Chancellor*, Feb. 4, 1938, at 19-20.

375. A vast array of examples of each method is given in Ehrenzweig, *supra* note 367, at 244.

376. The process of this particular evolution is discussed by one of its progenitors. William

Langdell's disciples did not enthusiastically greet these transformations. A 1907 panel of the American Association of American Law Schools fired the first salvos responding to Kales's article of that same year. Penn dean William Draper Lewis, Columbia dean George Kirchway, and Harvard dean James Barr Ames all attacked the idea that law schools should provide "knowledge" rather than the "power of legal reasoning."³⁷⁷ Roscoe Pound repeatedly blasted books promoting greater coverage stating, "the notion that the courses offered should include everything a student need know, that he need consider or will consider that is not gone over in class, is a mistaken one."³⁷⁸

Pound and others adopted still another method of promoting a comprehensive understanding of the principles of a topic—writing casebooks upon narrow, focused topics.³⁷⁹ Dean Griswold, speaking later at the University of Michigan, lambasted the pursuit of comprehensive training in one of the more memorable defenses of educational emphasis on process.³⁸⁰ He noted that the growth and complexity of legal materials taught in the same three years of law school has led to more hours in classrooms, more detailed and longer casebooks, and to more lectures and less class discussion. "All of these things, and more, are inescapable if we are going to try to cram all of the vast and growing complexity of American law into the three years which our students have in school."³⁸¹ Thus, Griswold argued, law professors

should worry less about details and ramifications, and should concentrate more on method, technique, vocabulary, approach, arts, and the other things that go to make up a lawyer who will be qualified to dig into problems, learn their details, and handle them well when problems come before him in later years—for the most part, problems the details of which we could not possibly teach him now, no matter how hard we tried.³⁸²

A. Keener, *Methods of Legal Education (Part II)*, 1 Yale L.J. 139, 148 (1892).

377. The debates are reprinted in *Proceedings of the Seventh Annual Meeting of the Association of American Law Schools* (1907), reprinted at 2 Amer. L. Sch. Rev. 116 (1907), and discussed in Schlegel, *supra* note 348, at 324.

378. Roscoe Pound, Book Review, 4 Ill. L. Rev. 150 (1909) (reviewing William E. Mikkell, *Cases on Criminal Law* (1908)).

379. See Roscoe Pound, *Cases on Equitable Relief Against Defamation and Other Injuries by Writing and Speaking: Supplementary to Ames's Cases in Equity Jurisdiction* (Cambridge 1915); Zechariah Chafee, *Cases on Insurance Supplementary to Wambaugh's Cases* (Cambridge 1917).

380. See Erwin Griswold, *Some Thoughts About Legal Education Today*, in *Frontiers in Law and Legal Education: Addresses Given at the University of Michigan Law Centennial*, Oct. 22-24, 1959 (1961).

381. *Id.* at 77.

382. *Id.* Other scholars have often expressed similar views. For example, E. Blythe Stason stated:

When Sir Edward Coke argued with King James about the supremacy of law over the crown (*circa* 1600), he read law in a library containing not more than 5,000

He summarized his view of law teaching with Thomas Reed Powell's description of then-Professor Felix Frankfurter's teaching: "Felix didn't teach the boys law He taught them lawyering. . . . ' [W]e need concern ourselves less about teaching law; and we should focus our abilities and energies on teaching lawyering. They really are quite different things."³⁸³

Despite its impossible magnitude, the idea of comprehensive coverage—of teaching the law—lingers to this day.³⁸⁴ Thus a tension remains between materials that promote education, using fewer examples to emphasize methods, and those that promote training, using more examples to emphasize content. From this tension, the modern casebook arises as a potentially dangerous compromise. In a 1967 speech, Dean Griswold noted a corporate ambivalence with the case method. While a "powerful device for inculcating a certain type of logical reasoning," the case method could easily be misused.³⁸⁵

[T]he case method . . . is only a tool. It is not an end in itself, and it is fully as dangerous as it is useful It has often been said, for a smile, that legal education sharpens the mind by narrowing it. To my mind, there is more truth to this than we have been willing to admit. . . . I do not reject the case method. I only argue that we should be careful in its use.³⁸⁶

Such misuse was already so common as to amount to a wholesale change in the method itself, narrowing the class dialogue from lawyering to laws so completely as to awaken the ghosts of the

reported judicial decisions. Today there are nearly 2,000,000

. . . [T]he postwar student of legal institutions finds himself confronted both with an endless and ever increasing array of legal problems—some old and many new, some unsolved, many insoluble—and by a virtually insurmountable mass of legal material of which he must become the master. No one mind can encompass all, or even a major fraction. Only the ablest minds can make a real dent in it. That is a significant thought and one not a little appalling

. . . Are we going to be able to produce the geniuses to solve the major problems of the future? Or is the profession so utterly inundated by the hosts of workday details that its members cannot "see the forest for the trees"? . . . Much depends upon the answer to these questions.

E. Blythe Stason, *Introduction to Arthur T. Vanderbilt, Men and Measures in the Law: Five Lectures Delivered on the William W. Cook Foundation at the University of Michigan*, Apr. 1948, at xii-xiii, xiv (1949).

383. Griswold, *supra* note 380, at 79.

384. See Reed, *supra* note 4, at 371; Ehrenzweig, *supra* note 367, at 245-46.

385. Erwin Griswold, *Intellect and Spirit, in The Path of the Law from 1967: Proceedings and Papers at the Harvard Law School Convocation Held on the One Hundred Fiftieth Anniversary of its Founding 149-150* (Arthur E. Sutherland ed., 1968).

386. *Id.*

commentators and lecturers.

D. The Case Method Reverts into the Class Quiz

Using a case *book* is one thing; using the case *method* is something else. Even as the casebook triumphed and became the national professoriate's unparalleled choice of text, the number of people engaged in the process led to considerable variation in how the books were used. In Herman Oliphant's 1927 study on legal education, the Columbia faculty carefully distinguished between using the cases as "*a method of investigation for discovering new truth, and the study of cases as a method of imparting knowledge already acquired.*"³⁸⁷

In 1952 Edmund Morgan identified three prominent varieties of teaching from the casebook. First, it is a vehicle for imparting legal doctrine, at a level in which "the average student will seek for nothing more than the judicially approved generalization of the case."³⁸⁸ Second, it is a mechanism for exactitude in understanding the facts and rationale of each case. Third, it is a basis for hypothetical extrapolation, a way in which to lead students to test the soundness of reasoning and to apply it to new situations. This third, most sophisticated approach is that closest to the views of Langdell and Ames, and Professor Morgan assumed that it was the method of "the majority of teachers in a modern law school." Concerns that this assumption was untrue in practice were even then being voiced.³⁸⁹

Despite the uniformity of schools' lauds of their own teaching, a suspicion had long lingered that Langdell's legacy had become not so much the exacting task of a case method discussion as the more predictable charade of a quiz game. Thus in the 1950s, the mammoth Survey of the Legal Profession was conducted, in which the inspectors' reports of the 160 schools suggested that the case method was weakly employed.³⁹⁰ The report frequently stated, for example, that a particular "school uses the case method." Often, though, further information contained in the report cast doubt on the statement's accuracy. A not atypical report from the inspector for Pennsylvania suggested that the schools observed were not so much using the case method to learn analysis as they were using an older form of student recitation to test memory.

The case system of teaching is in use, in the sense that casebooks are the teaching materials, but the teachers have not become accustomed to efficient use of the true case

387. Faculty of Law of Columbia University, *Summary of Studies in Legal Education* 44 (1928).

388. Morgan, *supra* note 311, at 383.

389. *Id.* Professor Morgan was a member of the Survey of the Legal Profession, and his 1952 article was a preliminary report. He had taught at Harvard and was then at Vanderbilt. *Id.* at 379.

390. See Lowell S. Nicholson, *The Law Schools of the United States: A Statistical and Analytical Report Based on 136 Completed Questionnaires and on Inspections of 160 Law Schools*, Prepared for the *Survey of the Legal Profession* (1958).

method of teaching. . . .

. . . [In Pennsylvania] . . . good case method instruction is a rarity. In this I do not think they are different from other law schools, including our most famous, for I am convinced there is a decline in the use of the case method as a whole. To avoid misunderstanding, it should be added that by 'the case method' I mean generally a method which involves a joint exploration of problems by instructor and class as contrasted with a method designed primarily to convey information from the instructor to the class.

Even in classes where instruction proceeded in the form of an exchange between the professor and the student, often the object seemed not that of conducting a joint examination of issues but rather of testing the student's knowledge by a kind of quiz. In these 'quiz' sessions, the ratio of student talk to professor talk was high, but the student was there, not to analyze and think along with the instructor, but to demonstrate to his instructor and his classmates that he knew his way about the law. . . .

At the hands of a good teacher instruction by the quiz method can be a very lively and entertaining thing, but it lacks the vital spark of genuine student participation. The student is in no sense helping to bring a solution into existence. He is demonstrating that he knows and understands the solutions that have been produced by other people: judges, legislators and professionals; restators of law. When he reads the case in the casebook, he reads it, not as a problem, but as an illustration of one of these solutions.³⁹¹

Lest there be any doubt of the observations of the inspectors, the report offered as examples contrasts between the rare purveyors of case instruction with the more numerous quizzers.³⁹² Bad examples included professors' giving answers rather than trying to make the students think for themselves, "furnishing the key to the bar exam" rather than stimulating legal reasoning, and assigning questions or cases to recite to individuals in advance, freeing other students from a sense of imminent participation.³⁹³

Over the last half-century, some of these methods, such as advance selection of students to recite, have become common practice. Still, in the 1995 survey, sixty-nine percent of responding professors (290 of 513), gave no notice to students before calling upon them.³⁹⁴

The case method as Ames employed it, if these circumstances prevail generally, has become so eroded that it is fair to say that the modern case-based dialogue is not necessarily the case method but is really just the

391. *Id.* at 33-35.

392. *See id.*

393. *See id.* at 37.

394. Question 88: "If you use dialogue, do you give students whom you will call upon notice beforehand? (1) yes, before class (2) yes, at the start of class (3) yes, occasionally (4) no" Responses: (1)=50(12%) (2)=5(1%) (3)=40(10%) (4)=290(69%).

earlier form of class recitation, even if it is based on cases instead of treatises. At least in the eyes of these inspectors, the least significant of Professor Morgan's three modes, the unsophisticated use of casebooks as tools just for learning principles, was by the mid-1950s the dominant method of teaching in America.

In part because of the shift in casebook use, and in part because of the greater complexity of the law and perhaps a greater appreciation of the flaws of the case method, by the end of World War II, the drumbeat of criticism had reached a din. As early as 1944, the AALS Curriculum Committee report on legal education, written largely by one-time casebook defender Karl Llewellyn, found that the case method was "failing to do the job of producing *reliable professional competence* on the byproduct side in *half or more of our end-product, our graduates.*"³⁹⁵

Criticism that the case method does not reach its goal of producing better novice practitioners has grown increasingly intense as the century has progressed.³⁹⁶ Many have also expressed the concern that a single method cannot work well in both upper-division and first-year courses.³⁹⁷ Further, others have argued that the case method is too difficult for the average student,³⁹⁸ which both increases student alienation³⁹⁹ and has lasting effects on their socialization.⁴⁰⁰

Perhaps the oldest complaint against the case method is that it is inherently biased toward law issued from the bench, relegating the study of

395. Stevens, *supra* note 4, at 214 (quoting AALS Proceedings, 1944 at 168).

396. See generally Deedra Benthall-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 Ky. L.J. 373, 393 (1975); Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 Va. L. Rev. 637, 648-49 (1968). This complaint is echoed by many practitioners. See Leonard I. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. Legal Educ. 264, 278 (1978). A current summary of implementary criticisms of the case method, with recommendations for keeping the books nonetheless is in Russell L. Wearer, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517 (1991).

397. Practically the only useful research in this regard is that in Charles J. Senger, *Learning Legal Reasoning in Law School: The Differences Between First and Third Year Students* (1989) (unpublished Ph.D. Dissertation, Michigan State University). For a more general discussion of cognitive styles in torts students, see Alfred G. Smith, *Cognitive Styles in Law Schools* (1979). For a study of shifts in student attitudes toward pedagogy over the three years, see Ronald M. Pipkin, *Legal Education: The Consumer's Perspective*, 1976 Am. B. Found. Res. J. 1161.

398. These concerns for the "average" or "C" student have cyclicly been raised, even at Harvard and Columbia, but changes of pedagogy to mitigate these limits have been routinely rejected. See generally Faculty of Columbia University, *supra* note 387; Harvard Law School, *Report to Faculty (Committee on Legal Education)* (1947).

399. While this effect is clear to anyone who has even walked near to law school buildings in this century, useful data toward proving this point, and details in understanding it in a more useful context are provided in Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 Mich. L. Rev. 887 (1977) (explaining the results of a study of alienated law students and examining the impact of these feelings on their lives).

400. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591 (1982); Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 Yale L.J. 444, 449 (1970).

legislation and executive acts to the dim recesses of specialized courses and casebook footnotes. Langdell's supporters resisted the teaching of legislation from the beginning.⁴⁰¹ Accompanying this resistance was an unfortunate delay in moving from common law and equitable pleading courses to modern courses in civil procedure.⁴⁰²

The case method is sometimes thought to be conservative, and unresponsive to changes in the law, in part because of Langdell's hostility to changing views of the law.⁴⁰³ In this regard the case method has been said to hinder the development of lawyers as makers of public policy.⁴⁰⁴ These results, however, are not necessarily any more a concern for the casebook or case-method teacher than they are for the treatise writer or lecturer. One last, and hopefully purely historical, invidious effect of the casebook was its use as an excuse for the decline of libraries. At Hastings, for example, the 1920s were a period of frequent relocation of the school, and reliance on the abundance of specialized casebooks, each with its collection of "the right" cases, helped to delay the construction of a proper library until 1953.⁴⁰⁵

Of course, professors can obtain the benefits of the case method in ways that mitigate these concerns. One plausible development from a synthesis of the training and education missions is the hybrid case-textbook, a book combining treatise or digest-like information with example cases. While the form is hardly novel,⁴⁰⁶ a demand remains for books that represent both the comprehensiveness of the treatise and the depth of selective case method analysis.⁴⁰⁷ In a manner of speaking, the modern, note-laden, casebook is such a synthesis.

401. Frank Grad places this dispute into the context of the rise of legislation as both a source of law and a focus of instruction in Frank Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 Dalhousie L.J. 228 (1985). Columbia offered a course in legislation beginning in 1928. Goebel & Howard, *supra* note 104, at 315-16; Milton Handler, *What, if Anything, Should Be Done by Law Schools to Acquaint Law Students with the So-Called New Deal Legislation and its Workings*, 8 Am. L. Sch. Rev. 164 (1935).

402. Columbia, influenced by Redfield's work at the turn of the century, adopted a civil procedure course in 1926. See Goebel & Howard, *supra* note 104, at 177, 319. For a fuller consideration of the history of procedure courses, see Mary Brigid McManomon, *The History of the Course on Civil Procedure* (forthcoming 1997); Paul D. Carrington, *A History of Civil Procedure* (forthcoming 1998).

403. See Samuel Williston, *Life and Law: An Autobiography* 200 (1940); Jacob Henry Landman, *Anent the Case Method of Studying Law*, 4 N.Y.U. L. Rev. 139 (1927).

404. See generally Harold Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203, 232 (1943).

405. See Barnes, *supra* note 224, at 149.

406. Zephaniah Swift's evidence book followed essentially this form in 1810. See Zephaniah Swift, *A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange with Promissory Notes* (New York, Arno Press 1972) (1810).

407. The argument for the case-textbook is put forth at length in Ehrenzweig, *supra* note 367, at 241-46.

E. Current Use of the Casebook

In the later twentieth century, there have been experimental departures from the casebook, a growth in the use of the problem book, and occasional efforts to rely on treatises. Still, the case method remains so firmly entrenched in the law school that even the Massachusetts School of Law, a school that today loudly criticizes the American Bar Association for its claimed unresponsiveness to change, maintains that it "teaches the traditional courses in the traditional ways, including the use of casebooks and heavily Socratic class discussion."⁴⁰⁸

The 1995 survey suggests that the casebook and the dialogue are overwhelmingly the most popular devices in American law school lecture halls. Of the survey respondents, eighty-six percent use a casebook as the "primary assigned text."⁴⁰⁹ Comparatively, a slightly higher percentage of teachers of predominantly common-law courses use casebooks than do their counterparts who teach statute-based courses. Casebooks were selected by ninety-three percent of respondents in common-law courses, and by seventy-nine percent of respondents in code courses.⁴¹⁰

IV. THE PROBLEM BOOK

The science of the age of steam was quickly assaulted by new, chaotic visions of the physical world, in which theory and experiment could completely destroy the established order of prior understanding. As new views of realism in law displaced Victorian theories of authority and class, studying law as the result of thorough organization seemed inadequate.⁴¹¹ The rules were no longer as important as the process by which the rules were understood. In law, the way to see the process of laws was to study the reasons and methods by which opinions are written and statutes are passed. This centerpiece of the original case method, displaced as the method eroded into the quiz-show class, not only remained essential to understanding the experimental scientific view of law but also became the

408. Massachusetts School of Law, *The Deeply Unsatisfactory Nature of Legal Education Today: A Self Study Report on the Problems of Legal Education and On the Steps the Massachusetts School of Law Has Taken to Overcome Them* 4 (1992). *See also* Massachusetts Sch. of Law of Andover v. American Bar Assoc., 65 USLW 2587 (3d Cir. 1991) (ABA accreditation process not antitrust violation). Likewise, a recent study of legal education by the ABA, strongly emphasizing the need for enhanced skills training, pursues this good by promoting distinct skills courses, making little mention of change or concern for the case method in the lecture hall. American Bar Association, Section on Legal Education and Admission to the Bar, *Legal Education and Professional Development—An Education Continuum* (The McCrate Report) (1992).

409. Question 43: "Is your primary assigned text best described as a—(1) Casebook (2) Treatise (3) Problem book."

410. Teachers of code courses selected treatises in four percent of responses and problem books in thirteen percent.

411. *See* Laura Kalman, *Legal Realism at Yale, 1927-1960*, at 98-144 (1986); John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

foundation for critical assessments of the validity of the enterprise as a whole. To more clearly focus such efforts for teacher and student when examining the materials a third mode of instruction, and a third form of text, devotes the class to exercises in solving complex legal problems with predesignated, hypothetical questions in the legal materials. This is the problem method.

Law books in the form of a catechism—expositions in the form of questions and answers so that a student may learn and memorize rote answers—have been popular for centuries. Their use by law students, generally without faculty approval and in the current manifestation as “commercial outlines,” is discussed below.⁴¹² More sophisticated answers are usually suggested by the problem approach, however, and it too has its antecedents, primarily in the moot courts and secondarily in frequent examinations.⁴¹³

There have long been efforts to encourage students to solve problems in class. Parsons seems to have required the solution to written hypothetical problems for solving pleading issues.⁴¹⁴ Wisconsin professor Henry Ballantine offered an early contrast between the case method dialogue and a problem approach to teaching large lectures as a method of ensuring that the student sees cases as problems and not as mere statements of law.⁴¹⁵ Such concerns were strategically, although not tactically, in keeping with Ames's views and those of other defenders of the casebook. The case method—when used precisely—is the presentation of a case as a problem, meant to be the foundation on which students are led to build various forms of structure. Even so, the decline of the case method into a quiz show quickly led to demands for more didactic approaches to problems that make clearer to the buyers of the books, whether professor or student, the problem-solving dimensions of the case. This demand was beginning to be met by the 1930s.

In 1927, and again in 1930, Jacob Landman, a professor at the College of the City of New York, wrote powerful criticisms of the case method, which he concluded was not really as “scientific” as had been suggested.⁴¹⁶ In Landman's view, scientific method required something scientific, namely the use of John Dewey's model of hypothesis and

412. See *infra* notes 503-522 and accompanying text.

413. For a detailed consideration of the quizzes of the nineteenth-century law school, see Sheppard, *Informal History*, *supra* note 8.

414. An 1848 notebook of cases on declarations sets out twelve problems for declarations of a debt. (unpublished manuscript, Harvard Law Library no. MS 5009).

415. See Henry W. Ballantine, *Teaching Contracts with the Aid of Problems*, 4 Am. U. L. Rev. 115 (1916).

416. See Landman, *supra* note 403, at 139; Jacob H. Landman, *The Case Method of Studying Law: A Critique* (1930) [hereinafter Landman, *Case Method*]. It is plausible that there might be earlier defenders of the problem method than Landman, although none were found in the research for this article. Professor Stevens begins his brief discussion of problem instruction with the writings of David Cavers, which are fifteen years later. See Stevens, *supra* note 4, at 215.

experiment, which usually requires five elements: "(1) the realization of a problem, (2) observation, diagnosis, definition, and classification of the data, (3) the entertainment of a tentative hypothesis, (4) the rejection or verification of the tentative hypothesis as a result of further deduction and induction, and (5) the formation of a belief."⁴¹⁷

Landman, however, observed that the examination of a case is not as strictly inductive, because the student is given the judicial result as necessarily correct⁴¹⁸ (an observation that suggests the case method of his experience was very much the quiz show approach). Instead, he proposed the use of a new "Problem Method," in which a student is given a legal problem of factual complexity, a bibliography of cases and other legal materials to be taken into account, an outline of the various issues that must be resolved with the legal materials in order to solve the problem, and extra-legal information with which to round out understanding of the facts and the law.⁴¹⁹ From this, the student was to

pass judgment in a pseudo-judicial fashion on the Problem. His tentative principle of law constitutes the inductive inference of law. . . . Deduction follows the inductive inference. . . . The student conducts [the provided materials] and applies his tentative principle of law to verify or to amend it. His inference or legal hypothesis may be wrong, but the prevailing rule of law may be wrong. For all that, the student has profited. Where the rule of law is fallacious, it places the student in the vanguard of legal enlightenment. . . . The law student terminated his scientific legal thought processes by arriving at a conclusion or principle of law, as the lawyer would refer to it.⁴²⁰

The problem method was a more structured means to the same end that Langdell and Ames had pursued.⁴²¹ It was precisely both Langdell's and Landman's point to teach cases as means not ends: the important goal was to teach the student how to use law, and teaching what the law is was only a secondary goal.

An important influence on the use of problems in law schools was the

417. Landman, *Case Method*, *supra* note 416, at 36.

418. *See id.* at 65-77.

419. There is little necessity for Landman's criticism of the case method as inductive rather than deductive. Legal reasoning uses both tools, and both tools are necessary to successful use of the case method, or even of the quiz show approach to the casebook. Still, the difference between the two approaches can be usefully highlighted in the problem method. *See* Charles Richard Calleros, *Variations on the Problem Method in First-Year and Upper-Division Classes*, 20 U.S.F. L. Rev. 455, 457-58 (1986). For a professional philosopher's view of the matter, see Peter Suber, *Analogy Exercises for Teaching Legal Reasoning* 17 J.L. & Educ. 91 (1988). Chicago-Kent Professor Dan Hunter is now deeply engaged in exciting research on these lines in a Cambridge doctoral thesis.

420. Landman, *Case Method*, *supra* note 416, at 91-92.

421. The place of Langdell's case method as a problem-based pedagogy is considered in Tom L. Beauchamp, *Case Studies in Business, Society & Ethics* (1989).

"case study" of the graduate business school. In the mid-1930s William O. Douglas, then at Yale, offered such instruction in joint law and business courses, observed by young Abe Fortas:

A real-life factual situation which had been carefully compiled and completely documented by the Harvard Business School was presented for study; then the alternative avenues which one might consider for solution of its financing problems were explored. There was, by design, indiscriminate attention to and discussion of the business problems and considerations and their legal aspects.⁴²²

By 1940 the problem method was the basis for a successful Columbia seminar. Julius Goebel, Richard Powell, Walter Gellhorn, Elliot Cheatham, and several practitioners ran two sections of a Seminar in Selected Legal Problems. During the seminar, held once a week, the practitioners submitted a problem from their active files and students discussed the problem and later submitted memoranda suggesting solutions.⁴²³

David Cavers at Duke⁴²⁴ and Karl Llewellyn at Columbia⁴²⁵ both adopted the new method in the lecture hall, Cavers teaching conflicts of laws and Llewellyn using it in his upper-level commercial law courses.⁴²⁶ Llewellyn also required problems to be

422. Abe Fortas, *The Training of the Practitioner*, in *The Law School of Tomorrow: The Projection of an Ideal* 179, 182 (David Haber & Julius Cohen eds., 1968). For a discussion of the development of problems and teaching styles generally at Yale, see Kalman, *supra* note 412.

423. See Goebel & Howard, *supra* note 104, at 338-39.

424. See David F. Cavers, *In Advocacy of the Problem Method*, 43 *Colum. L. Rev.* 449, 455 (1943).

425. See Karl Llewellyn, *The Current Crisis in Legal Education*, 1 *J. Legal Educ.* 211, 217 (1948-49).

426. According to Llewellyn:

The course would promote skills in "(1) Statutory Construction (2) Reading, absorption, analysis and application of text material (3) Organization of case material plus the foregoing, for counseling and for appellate argument (4) simple commercial drafting." Students were to "make heavy use of the *text* material, of three kinds: Uniform statutes, and other statutes as needed, in both the present and the proposed Revised form . . . (2) The "Legal" text: notably the Comments on the Revised Acts . . . [and] (3) "Background" text which sets a picture of business problem and business practice."

The key to his course was to center work and discussion around "Problem Materials selected to *cumulate* practice in techniques, but to *range* in point of the requisite legal information." His plan for the course, which was partly built on problems created by Soia Mentschikoff, expected the students to solve "8 problems properly chosen and somewhat intensively developed. This gives as an average of 6 hours per problem (which is a squeeze) plus 4 hours introduction while the students seek to learn to *read*, and 4 hours general leeway." In creating the problems, he attempted to occupy available student time, measured by the number of students in the course, their likely teamwork, and the availability of teaching assistants. In general, his aim was to "consume 2½ hours outside time per class hour" or ten hours

solved by teams. Arthur Larson used a very similar technique at Cornell, although his inductive element was interjected by requiring students to hypothesize solutions to the factual problem before being exposed to the legal materials.⁴²⁷

The problem method became a frequent experiment in the 1950s. The University of Pittsburgh created a mandatory summer problems course of eight weeks at the end of the second year. Pitt students were organized into "firms" of five, acting on problems brought to them by faculty clients, usually involving a commercial transaction leading to noncommercial problems.⁴²⁸ In 1951 the problem method reached the University of Michigan, when L. Hart Wright and Paul Kauper integrated it into their tax courses and casebook.⁴²⁹ Kauper also integrated problems into his privately printed constitutional law casebook,⁴³⁰ although the problems were much less in evidence in his commercial revision two years later.⁴³¹ Harvard used problems in its government regulations course, Northwestern's Albert Cocourek used problems in secured transactions, and Colorado used them in constitutional law.⁴³² Notre Dame implemented the problem method in all of its upper-year courses; professors drafted problems of varying length and complexity and distributed them to students in advance of class discussions. The discussions were interrogative, with the professor asking questions and moderating students in their answers to the problem.⁴³³ Kansas City offered problems courses for the third year.⁴³⁴ With the increased interest in the pedagogy of problems, national faculty began to show greater interest in the methods of problem solving. By 1962 the idea of problem solving as an abstract skill was taught

weekly.

Karl Llewellyn, Memorandum, A Commercial Law Course of 4 semester hours, Spring, 1948 (Karl Llewellyn Papers, Columbia Law School treasure room). Paul Carrington has suggested that Llewellyn's commitment to case-based instruction remained strong throughout his life, despite such experiments. Letter from Paul Carrington to Steve Sheppard (April 8, 1996).

427. See Arthur Larson, *An "Inductive" Approach to Legal Instruction*, 1 J. Legal Educ. 287, 287-88 (1948-49).

428. See Charles W. Taintor, *Required Summer Term and "Problem" Course*, 2 J. Legal Educ. 347 (1950).

429. See Paul G. Kauper & L. Hart Wright, *Cases and Materials on Federal Income Taxation* (1951) (prepared for the use of students in the University of Michigan Law School); Elizabeth Gaspar Brown, *The Law School of the University of Michigan: 1859-1984: An Intellectual History*, 18 J.L. Reform 341, 349-50 (1985).

430. See Paul G. Kauper, *Cases on Constitutional Law* (1952) (Prepared for the exclusive use of students in the University of Michigan Law School) (3 vols.).

431. See Paul G. Kauper, *Constitutional Law: Cases and Materials* (1954).

432. See sources collected in Stevens, *supra* note 4, at 228 nn.83-84.

433. Moore, *supra* note 355, at 112; Bernard J. Ward, *The Problem Method at Notre Dame*, 11 J. Legal Educ. 100, 107 (1958).

434. Marlin M. Volz, *The Legal Problems Courses at the University of Kansas City*, 7 J. Legal Educ. 91, 91 (1954). Kansas City students were offered three courses totaling seven hours. See *id.* at 93.

at the University of Buffalo in an elective "Creative Problem Solving Course."⁴³⁵

In addition to the creation of specialized courses to teach problem solving as a skill, the problem approach has strongly influenced traditional lecture-hall courses.⁴³⁶ Early experiments using problems have led to changes in the modern casebook. Some current casebooks include brief problems like those promoted by Ballantine;⁴³⁷ others are wholly organized around Landman's "problem cases" in which facts or authority were pared from cases, and the students were encouraged to work their way through an analysis using cases⁴³⁸ or a bibliography provided by the instructor.⁴³⁹

The problem approach remains a popular framework for numerous pedagogical innovations.⁴⁴⁰ Films and other media, team learning, hypotheticals, role plays, and narratives are often ancillary mechanisms for the solution of a problem.⁴⁴¹ In the 1995 survey, respondents teaching in all-lecture courses assigned problem books in nine percent of the courses surveyed. This number reflects higher use of problem books in code courses, for which thirteen percent of the teachers reported using problem books, as opposed to common-law courses, for which problem books were assigned only three percent of the time.

V. THE CURRENT ECLECTICISM

The casebook and the problem book were born of the nineteenth-century view of scientific laws as a means of improving the environment for humanity. This vision, along with its culture, has at least partially crumbled before a post-modern depiction of the universe as a complicated mess of forces that Einstein, Heisenberg, and company have shown to vary considerably according to whose eye is on them.⁴⁴² The American legal system has grown too complex to be singularly understood in every detail, and the commands and rationales of the multitudes of lawmakers are no

435. Gordon A. MacLeod, *Creative Problem Solving—For Lawyers!!*, 16 J. Legal Educ. 198, 198 (1963). Numerous models of problem solving technique have been presented, a representative model of which is presented in H.F.M. Crombag et al., *On Solving Legal Problems*, 27 J. Legal Educ. 168 (1975).

436. See Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. Legal Educ. 167 (1989); Leo H. Whinery, *The Problem Methods in Legal Education*, 58 W. Va. L. Rev. 144 (1955).

437. See, e.g., Jesse Dukeminier & James E. Krier, *Property* (2d ed. 1988).

438. See, e.g., Edward H. Rabin, *Fundamentals of Modern Real Property* (2d ed. 1982).

439. See Ehrenzweig, *supra* note 367, at 236. Materials for use in teaching with problems have recently been summarized. Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. Legal Educ. 241 (1992).

440. See Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. Legal Educ. 654 (1984).

441. See *infra* section V.

442. See, e.g., Werner Heisenberg, *The Copenhagen Interpretation of Quantum Theory*, in Werner Heisenberg, *Physics and Philosophy: The Revolution in Modern Science* (1958).

longer thought to pursue coordinated goals according to a comprehensive philosophy. To bring order to this universe, the professor may rely on the cases to exhibit manifestations of law, but the cases may as easily be seen as acts of an official's will or as manifestations of rules binding the official.

The organization of law in this age is less often called scientific, even if it reflects contemporary views of science. Instead, the emphasis has perceptibly shifted from concern for the methods by which laws are made to the influence of the people who engage in those methods. Ironically, though, to study this influence, the artifacts from courthouses and legislatures, the stuff of the rules of law, remain the only benchmarks. To attempt to measure the accuracy of the benchmarks, the study of these rules remains a necessary precondition. Thus, in the midst of a continuing hegemony of the case method, there has been much experimentation in developing new mechanisms for teaching along two paths; one seeks to change the structure of student work out of class, and the other seeks to change the structure of class presentations.⁴⁴³

This section presents several of the divergent channels down which this current flows. While the first example, the use of anthologies and readers, is meant almost solely to provide information to students, the remainder of the examples demonstrate means to counteract student alienation. The numerous other pedagogical techniques in use, such as the teaching of ethical values and the critiquing of writing exercises, are discussed elsewhere.⁴⁴⁴

It is important to bear in mind that, despite the various means of accomplishing certain aims, the aims remain the same. In the 1995 survey, the largest groups of respondents devoted the bulk of class time to case discussion (75-99%), leaving considerably less time for elaborating principles (25-50%), solving problems (25-50%), and considering theory underlying the course (25-50%).⁴⁴⁵

443. For a recent guided tour of trendy classroom techniques, see the materials collected in Association of American Law Schools 1995 Conference: New Ideas for Experienced Teachers, Conference Materials, particularly the reprint of Arturo L. Torres & Karen E. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 1994 Gonz. L. Rev. 1.

444. See Closen et al., *supra* note 3.

445. There is an obvious error in the construction of this question, and the interpretation of any validity in the answers is left to the reader. For the interpretative and comparative reconstruction of this data, see Sheppard, *State of the Art* Question 89: "In a week, how much time of your class is spent discussing cases representative of your field? (1) none (2) 1-25% (3) 25-50% (4) 50%-75% (5) 75-99% (6) all" Responses: (1)=7(2%) (2)=99(24%) (3)=96(23%) (4)=169(40%) (5)=25(6%).

Question 92: "In a week, how much time of a class is spent elaborating the 'black letter law' in your field? (1) none (2) 1-25% (3) 25-50% (4) 50%-75% (5) 75-99% (6) all" Responses: (1)=27(6%) (2)=322(76%) (3)=42(10%) (4)=12(3%) (5)=0(0%).

Question 95: "In a week, how much time of your class is spent solving problems illustrating the law in your field? (1) none (2) 1-25% (3) 25-50% (4) 50%-75% (5) 75-99% (6) all" Responses: (1)=28(7%) (2)=293(70%) (3)=63(15%) (4)=21(5%) (5)=5(1%).

Question 98: "In a week, how much time of your class is spent considering theoretical

A. Theory Readers and Anthologies

In the years following the essential triumph of the case method, concern has perennially been expressed that an unfortified diet of casebooks does not provide students with contextual and theoretical approaches to law that courts have not overtly adopted. Various supplementary schemes have evolved to remedy this perceived deficiency. Many casebooks and treatises now include social science materials as part of the readings, especially in problem-approach books.⁴⁴⁵ Other approaches have been more radical.

In 1930 for instance, Columbia created a summer reading list of "Great Books" for first-year students.⁴⁴⁷ A page-long list of questions concerning the ideas of the text and their application accompanied each book on the list.⁴⁴⁸ The idea soon expanded, and the requirements included not only a short pre-entrance list of one book on the elements of law and one on logic, but also an optional second-year list including books in law, philosophy, ethics, logic, scientific method, and history.⁴⁴⁹ While the course was initially popular, there were management problems from the start, such as occasional assaults on the books in the library.⁴⁵⁰ More troublingly, students assembled outlines and cram courses which, even after a faculty ban in 1937, continued to bankrupt the original idea of individual study of great books in law. After several years of faculty dithering, the reading list was replaced by a required upper-class course in jurisprudence.⁴⁵¹

A similar, if less pan-curricular, approach of assigning theoretical

underpinnings of your field? (1) none (2) 1-25% (3) 25-50% (4) 50%-75% (5) 75-99% (6) all"
Responses: Survey 98 (1)=10(24%) (2)=337(80%) (3)=49(12%) (4)=7(2%) (5)=2(0%).

446. See David Reisman, *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration*, 50 Yale L.J. 636 (1941).

447. Announcement of School of Law 1930-31, Memorandum, First Year Assigned Readings, in Columbia University School of Law Faculty Reports and Studies, 1928-31 (Columbia treasure CU C7135 F13).

448. The list included Aristotle's *Politics*, Pollock's *Maine's Ancient Law*, Hobbes's *Leviathan*, Lowie's *Primitive Society*, Sumner's *Folkways*, Gray's *Nature and Sources of the Law*, Jhering's *Law as a Means to an End*, Pound's (initially) *Introduction to the Philosophy of Law* (and later) *Introduction to Legal History*, Holmes's *Collected Papers*, Cardozo's *Nature of the Judicial Process*, Llewellyn's *A Modern Law School*, and four further articles, including Francis M. Burdick, *Is Law the Expression of Class Selfishness?*, 25 Harv. L. Rev. 349 (1911). These books were assigned at the beginning of the first year, and an examination was given on them in September of the second year.

449. See Memorandum, *Optional Readings for Second and Third Year Students* (Columbia Law School treasure CU C735 Op).

450. "Library facilities for his enterprise are not easy to arrange. The Committee has placed ten copies of each book or periodical . . . on reserve The Committee casts its curse of unchastity upon any knight who mutilates the book! May his name be Vandal and his bones bleach unshriven!" Memorandum, First Year Assigned Readings Foreword: The Play of Ideas 3 (Columbia Law School treasure, Karl Llewellyn papers).

451. Goebel & Howard, *supra* note 104, at 340.

readers in particular courses has again become popular since the mid-1980s. While professors have long created their own collections of readings, West, Little Brown, and recently, Anderson Publishing, have begun producing large numbers of anthologies designed to augment casebooks in particular courses.⁴⁵²

In the 1995 survey, most respondents recommended some form of auxiliary reading, whether articles, anthologies, codes, treatises, or histories,⁴⁵³ and this pattern was as true for courses based on the common law as it was for courses based on statutes. Seventy-nine percent of all respondents make such assignments, numbers which vary only slightly by form of course.⁴⁵⁴ Although most respondents discussed some of this assigned material in class,⁴⁵⁵ substantially fewer professors reported examining students on such material.⁴⁵⁶

B. Team Learning

Most nineteenth-century law schools were home to an array of clubs devoted to law, many of which hosted debates and moot courts. While a few of these clubs survive, and although there are practice-area specific organizations, few student organizations in law schools today are organized to promote understanding of the law taught in the classroom. On the other hand, students in nearly all law schools, especially first-year students, work together both informally and in relatively structured study groups. Professors are increasingly interested in encouraging such study and in assigning work, both in class and out of class, to such groups.⁴⁵⁷ One such model of group work is that of the Oxbridge tutorial study group.⁴⁵⁸

Assigning students to opposing arguments of a case is, in a manner, the contrast to team learning.⁴⁵⁹ This may be done with teams on either

452. Anderson has positioned itself as a market leader in this field. Its publication list includes over forty anthologies in most commonly-taught fields. See, e.g., publisher's advertisement in *A Property Anthology* (Richard H. Chused ed., 1993).

453. Question 47: "Do you recommend auxiliary readings, such as articles, anthologies, codes, treatises, or histories? (1) yes (2) no."

454. In common-law courses, 78% (222) answered "yes," 21% (60) answered "no." In code courses, 80% (164) answered "yes," and 17% (35) answered "no."

455. Question 48: "Do you discuss auxiliary readings in class? (1) yes (2) no" Answers for (1) were 215 (51%) and for (2) were 193 (46%). These answers were again consistent when the response pool was divided into common law and code courses: Common Law: (1)=52%(148) (2)=46%(130). Statute: (1)=50%(102) (2)=48%(97).

456. Question 49: "Do you examine the students on auxiliary readings? (1) yes (2) no" Answers for (1) were 133 (32%) and for (2) were 270 (64%). These answers were again consistent when the response pool was divided into common law and code courses: Common Law: (1)=32%(91) (2)=66%(185). Statute: (1)=30%(61) (2)=66%(135).

457. See John M. Burnam, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. Legal Educ. 447 (1992); David F. Cavers, *The First Year Group Work at Harvard*, 3 J. Legal Educ. 39 (1950); David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. Legal Educ. 175 (1994).

458. See Clive Parry, *The Cambridge Supervision System*, 7 J. Legal Educ. 1 (1954).

459. See Howard L. Oleck, *The "Adversary Method" of Law Teaching*, 5 J. Legal Educ. 104

side, or with individuals, and it may be done either as a predesignation, or as a part of the surprise technique of daily examination.

C. Hypotheticals and Role Playing

Beyond the use of the problem approach as a mode of presenting an entire course, professors are increasingly augmenting problems with more detailed hypotheticals intended for use during several lectures or an entire semester. An extension of the hypothetical is a role play, in which students assume the persona of participants in the hypothetical problem, as lawyers, clients, witnesses, affected third parties, or legal officials.

One of the most successful recurring hypotheticals is *The Buffalo Creek Disaster*, a book used in civil procedure courses.⁴⁶⁰ The book chronicles the causes and effects of a disastrous mining accident and flood in West Virginia, paying considerable attention to the litigation that followed. The students are thus exposed not only to the horrible circumstances in which the law must seek remedies, but also to the specific procedural choices made by the lawyers on all sides as the cases progressed through the courts. Civil procedure professors have made considerable use of the book and the case, both to illustrate actual pre-trial litigation and to challenge students for alternative approaches.⁴⁶¹

Another approach to such hypotheticals is to simulate a legal situation, having students represent various views. The simulation may be brief, occupying only a small portion of one class, or it may last over an entire course.⁴⁶² Faculty members perform some simulations alone,⁴⁶³ though most examples offered in the literature employ students as actors. Students may assume the role of lawyers, litigants, or judges.⁴⁶⁴ Students in constitutional law courses at South Dakota, Iowa, and the University of Chicago, at the least, have taken the role of sitting Justices of the U.S. Supreme Court.⁴⁶⁵ While most of these courses have been smaller seminars, the technique was employed at the University of South Dakota in an upper-level survey course, and aimed to develop understanding of recurrent themes, to emphasize the role of facts in adjudication, to

(1952). A superb, and sophisticated, example of paradoxical team work both in transactional and litigious settings is illustrated in Phyllis G. Coleman and Robert M. Jarvis, *Using Skills Training to Teach First-Year Contracts*, 44 Drake L. Rev. 725 (1996).

460. See Gerald M. Stern, *The Buffalo Creek Disaster* (1976).

461. I am grateful to my colleague Mark Kende for introducing me to *Buffalo Creek* several years ago. Good illustrations of its use are in Charles A. Rees, *A Calendar of Buffalo Creek Hypotheticals for the Civil Procedure Course*, 18 Ohio N.U. L. Rev. 233 (1991).

462. For an example of a long-playing simulation, see Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. Rev. 137 (1989).

463. See, e.g., John Barkai, *The Lecture-in-Disguise*, 19 N.M. L. Rev. 117 (1989).

464. See, e.g., Denton Moore & Jerry Tomlinson, *The Use of Simulated Negotiation to Teach Substantive Law*, 21 J. Legal Educ. 579 (1969); Charles W. Taintor, *Required Summer Term and "Problem" Course*, 2 J. Legal Educ. 347 (1950).

465. See David S. Day, *Teaching Constitutional Law: Role Playing the Supreme Court*, 36 J. Legal Educ. 270 (1986).

encourage cooperative learning, and to reduce boredom.⁴⁶⁶ Similar exercises have been used in administrative law⁴⁶⁷ and in many of the traditional first-year courses.⁴⁶⁸

In the 1995 survey, most respondents reported using some form of role play, including mock arguments.⁴⁶⁹ Twelve percent reported doing so "frequently," thirty-seven percent "occasionally," and twenty-four percent "rarely." Only twenty-three did not use any role play or mock argument at all.

D. Narratives and Stories

The narrative emphasizes a common element in the discussion of cases and other experiences of the law—stories of people's lives. Teaching as narrative is a tool used to tell the stories that matter, and to tell them so that students understand the law's effect on individuals.⁴⁷⁰ Narrative is a mechanism for heightening student awareness of the recurrent occasions of harshness and injustice of the law. It may also serve to include students in the classroom teaching experience in an effort to defeat the hierarchical structure of the classroom.⁴⁷¹ Narrative as pedagogy is a direct offspring of the use of narrative in feminist jurisprudence,⁴⁷² although many of its promoters are not as closely identified with that school as with law and literature or law and society movements.⁴⁷³ The form of the narrative may be storytelling, so long as the story is set in a personal frame, such as a biography or autobiography, and the stories may be recited or shown in film.⁴⁷⁴ The narrative may illustrate human motivation or responses to

466. See *id.* at 269; see also Robert P. Davidow, *Teaching Constitutional Law and Related Courses through Problem-Solving and Role Playing*, 34 J. Legal Educ. 527 (1984) (finding that role playing helps early law school learning of substantive law and results in proficient lawyering).

467. See, e.g., Michael S. Botein, *Simulation and Role Playing in Administrative Law*, 26 J. Legal Educ. 234 (1974).

468. See, e.g., Kenny Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. Legal Educ. 534 (1981); Joseph W. Little, *Skills Training in the Torts Course*, 31 J. Legal Educ. 614 (1981). See also Coleman and Jarvis, *supra* note 459.

469. Question 110: "Do you have students or others 'role play' in your classes, including mock arguments? (1) frequently (2) occasionally (3) rarely (4) no."

470. See Peter Brooks & Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (1996).

471. In this way, narrative may move beyond Duncan Kennedy's criticism that a primary effect of law schools is to prepare students for roles in hierarchies. See Catherine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. Legal Educ. 155, 162-63 (1988) (arguing that narratives are part of the process by which old pedagogies are superseded). See, e.g., Shauna Van Praagh, *Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education*, 2 Colum. J. Gender & L. 111, 140-44 (1992) (discussing how storytelling expands learning potential in law schools).

472. For an example of narrative discussed with reference to feminist jurisprudence, see Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 61-67 (1988).

473. See Paul Gewirtz, *Introduction*, in *Law's Stories: Narrative and Rhetoric in the Law* 2, 3-4 (1996) (using "law as literature" to describe the law and literature movement in its relationship with narrative).

474. See John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media,*

legal or social stimuli. While the narrative forms a basis for understanding, as a hypothetical, it is sometimes also presented for its content, as a visceral criticism of law, or occasionally of lawlessness.⁴⁷⁵

Teaching as narrative is controversial. Narratives may take a long time to make a short point.⁴⁷⁶ Moreover, a story may present itself as truth in statements with little reference to history of or extratextual reality. Thus, counterfactual stories may be presented as factual, the rare may be presented as common, and the unknown may be described as fully known. The added authority of an autobiographical or biographical claim need not affect these opaque attributes of the narrative, as self-referential stories are inevitably presented as perceptions.⁴⁷⁷ Of course these claims may be as easily raised as criticism of most texts, including treatises and judicial opinions.

VI. TECHNOLOGY IN THE CLASSROOM

One of the most powerful influences on the lecture is external to the lecture hall itself—the changes in opportunity posed by changes in technology. In a manner of speaking, technology entered the classroom long ago, with the use of manuscripts from the scriptorium, the printed book, and other forms of print duplication media. More recently, film, video, and computing technologies have made considerable progress into the lecture hall and into student preparation. This trend will likely accelerate in coming years.

A. Films, Tapes, and Television

Films and movies have long been a mechanism for comprehensively presenting hypothetical cases. As Irving Younger put it, "You can show any movie and relate it to the law in some way."⁴⁷⁸ Films have also been used to instruct both in legal history and principles and in the social environment surrounding legal disputes.

While the first use of film in the law school classroom is still lost in the mists of time, the practice was widespread in collegiate instruction and military training by the mid 1920s, and it seems likely that some enterprising professor had begun using them in a law school.⁴⁷⁹ By the

Story, and Law Learning, 40 J. Legal Educ. 19, 26-29 (1990). See also *infra* notes 479-489 and accompanying text.

475. See Teresa Godwin Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. Legal Educ. 133, 134-35 (1990).

476. See David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. Legal Educ. 3, 5 (1990) (pointing out the potential conflict between well-developed narratives and our cultural predisposition to be easily bored).

477. But see H. Jefferson Powell, *Transparency, Opacity, and Openness in Narrative*, 40 J. Legal Educ. 161 (1990).

478. Robert Stein, *A Tribute to Irving Younger*, 73 Minn. L. Rev. 815, 816 (1989).

479. A good candidate for the first law film may be the film of the Dreyfus affair produced in 1898 by Doublier. See Erik Barnouw, *Documentary: A History of the Non-Fiction Film* 25-26

end of World War II, professors had added film strips to their arsenal, and by the late 1960s, the ABA published a bibliography of eight hundred movies and film strips for law school use.⁴⁸⁰ This bibliography included commercially produced movies, newsreels, and documentaries.

Perhaps the most notable of the documentary producers in the cross-over between hypothetical and history is the work of Frederick Wiseman, whose films *Titticut Follies*, *High School*, and *Law and Order* broke new ground in presenting chronicles of life in an asylum for the criminally insane, an urban high school, and a mid-sized city police department. These films, and their successors, have remained popular as demonstration pieces in law schools.⁴⁸¹

Films are often shown out of class, particularly movies that provide particular legal and historical information. Buffalo has long held a Labor Law Film Festival for this purpose,⁴⁸² and Thomas Cooley offers a Constitutional Law Bijou.⁴⁸³ Professors continue to use films in class as a catalyst for classroom discussion of hypotheticals.⁴⁸⁴

The use of tape recordings, particularly of oral arguments, seems to have dramatically increased with the public release of Supreme Court oral argument tapes in the series, *May It Please the Court*. Some use of such material has been common for years, particularly the integration of oral argument tapes already in the public domain.⁴⁸⁵

Television viewing, both via live broadcast and, more significantly, on videotape, has become a common event in recent years. Professors use television in the same manner as they have films—primarily as the basis for hypotheticals and sometimes as an instructional medium for its own content. As a source of hypotheticals, television shows about lawyers have been popular for both procedure and ethics courses.⁴⁸⁶ Besides the

(1974).

480. American Bar Association, *Films and Film Strips on Legal and Law-Related Subjects* (rev. ed. 1974).

481. Telephone Interview with Frederick Wiseman (July 25, 1995); Letter from Karen Konicek, Zipporah Films, to Steve Sheppard (July 27, 1995) (on file with author) (noting that Wiseman's films have been ordered for use in Harvard, Yale, Dickinson, Michigan, Bridgeport, and Boston University, among others).

482. Telephone Conversation with Buffalo professor John Henry Schlegel (Aug. 1, 1995).

483. The author of this Article does so.

484. A collection of discussions of films for this purpose is forthcoming in Reynard Strickland, *Screening Justice* (forthcoming 1998). See Justin Brook's use of Beverly Hills Cop in criminal procedure, in *Will Boys Just be Boys 'n the Hood?: African American Directions Portray a Crumbling Justice System in Urban America*, in *Screening Justice* (forthcoming 1998).

485. See Paul R. Baier, *What is the Use of a Law Book Without Pictures or Conversations?*, 34 J. Legal Educ. 619, 626 (1984).

486. See, e.g., Steven P. Gillers, *Popular Legal Culture: Taking L.A. Law More Seriously*, 98 Yale L.J. 1607 (1989); Lee Stuesser, *The Need for Change in Teaching Law*, 38 U. New Brunswick L.J. 55, 72 (1989). The bulk of recent sources and references are collected in Christine Alice Corcos, *Columbo Goes to Law School: Or, Some Thoughts on the Uses of Television in the Teaching of Law*, 13 Loy. L.A. Ent. L.J. 499 (1993). This material has yet to include the wealth of attention given to the trials of O.J. Simpson, although such an inclusion is probably certain to occur.

reproduction of commercially produced tapes, video technology is also used in training for courtroom use and in student self-evaluation.⁴⁸⁷

In the 1995 survey, nearly a third of the responding professors use films in conjunction with their lectures, most of them using films during lectures.⁴⁸⁸ Twenty-seven percent (113 respondents) use films during class. A small number (34 respondents) provide films out of class, either as required viewing, or as an option. Even so, sixty percent (255 respondents) reported using no audiovisual materials.

B. Computer-Aided Research and Communications

Computer assisted legal research began with an experimental system in Ohio, created as a result of a 1967 contract between Ohio Bar Automated Research, a division of the state bar association, and Data Corporation, a small information retrieval company soon thereafter acquired by the Mead Corporation.⁴⁸⁹ The result was Lexis, operational in 1970 with a database holding the full text of Ohio's constitution, statutes, and judicial opinions, all indexed to be sorted by every word.⁴⁹⁰ The system was quickly expanded, initially including the laws of Texas and Missouri, and eventually becoming international. Meanwhile, competition was quick to arrive from West Publishing Company, which introduced Westlaw in 1975, its national on-line service. As students and professors became more familiar with these systems and as technological advances made them more flexible, the national databases moved from a method of updating classnotes to a mechanism available for use in the classroom. Most significantly for the future, the availability of these services will allow students who were once dependent on physical access to a law school's library to retrieve much of their research at long distance.⁴⁹¹

The use of computers in more direct pedagogy has fascinated many observers.⁴⁹² Numerous schools have invested resources in a consortium

487. See Vincent Robert Johnson, *Audiovisual Enhancement of Classroom Teaching: A Primer for Law Professors*, 37 J. Legal Educ. 97 (1987). A glance at use of audiovisual recordings earlier in the age of video recording is given in New York Law School's 1974 survey of videotape use, which found most video use in law schools was then in clinics. Michael Botein, *Videotape in Legal Education* (Communications Media Center, New York Law School 1989).

488. Question 109: "Do you use films or other audiovisual material with your course? (1) during class (2) required outside of class (3) optional outside of class (4) no."

489. See William G. Harrington, *Computers and Legal Research*, 56 A.B.A. J. 1145, 924 (1970).

490. See William G. Harrington, *What's Happening in Computer Assisted Legal Research?*, 60 A.B.A. J. 924 (1974).

491. For several visions of the future under such a system, see Ronald W. Staudt, *Does the Grandmother Come With It?: Teaching and Practicing Law in 21st Century*, 44 Case W. Res. L. Rev. 499 (1994); James L. Hoover, *Legal Scholarship and the Electronic Revolution*, 83 L. Libr. J. 643 (1991); Charles D. Kelso & J. Clark Kelso, *How Computers Will Invade Law School Classrooms*, 35 J. Legal Educ. 507 (1985).

492. For a current depiction of computer-aided teaching, see Richard A. Matasar & Rosemary Shiels, *Electronic Law Students: Repercussions on Legal Education*, 29 Val. U. L. Rev. 909 (1995). For early visions of the merger between computers and writing programs, see Layman E. Allen & Charles S. Saxon, *One Use of Computerized Instructional Gaming in Legal Education: To*

established in 1982 to develop CALI, or "computer assisted legal instruction," an interactive computer law teaching system now available with computer text files to explain and test basic rules in a multitude of core subjects.⁴⁹³ Moreover, many schools have created departments for the development of educational technology. Harvard's Educational Technology Center publishes interactive videodiscs for law student training.⁴⁹⁴ Cornell opened its Legal Information Institute in 1992, which has now published basic materials in civil procedure, administrative law, and evidence on its Web site.⁴⁹⁵ The few months in which this Article has been in production over the winter of 1996-1997 have seen an explosion of both the number of law-related web sites and the quality of content available on them. Such growth of information provision and access augers much for teachers in the near future and demonstrates the finality of prediction over our horizon.

C. *The Electronic Casebook*

In the 1990s, considerable attention has been given to the production of computer-driven casebooks and treatises. Using Folioworks and other increasingly high-powered computer programs, law professors are creating computer-based class preparation materials that they integrate into their lectures. These materials are hybrids of casebooks and textbooks and are designed to communicate with national databases on the Internet, both through hypertext markup facilities on the world-wide web and through Westlaw and Lexis databases. Ron Staudt produced what is apparently the first electronic casebook—the Folioworks coursebook in computer law—in 1992 at Chicago-Kent's Center for Law and Computing.⁴⁹⁶

Along with these technological changes in course materials, telecommunications advances in the merger of cable television and telephone companies now allow a cable or satellite link between various sites, so that a class may occur simultaneously in several locations.⁴⁹⁷ When these facilities are more complete, professors will be able to teach law courses to students at widely divergent sites, using materials that

Better Understand the Rich Logical Structure of Legal Rules and Improve Legal Writing, 18 J.L. Reform 383 (1985). For a more general forecast, see Roger Park & Russell Burris, *Computer Aided Instruction in Law: Theories, Techniques, and Trepidations*, 1978 Am. B. Found. Res. J. 1.

493. 4th Annual Conference for Law School Computing Professionals: Conference Materials (Chicago-Kent & CALI Project ed., 1994) [hereinafter *Computing Conference Materials*].

494. Jeremy Seeger, *The Educational Technology Center at Harvard University Law School*, in *Computing Conference Materials*, *supra* note 493, at 445.

495. See Peter Martin, *The Legal Information Institute at Cornell University Law School*, in *Computing Conference Materials*, *supra* note 493, at 440, 442. Similar work is done at Villanova. See Henry H. Perritt, Jr., *The Center for Law, Information & Policy & Villanova University School of Law*, in *Computing Conference Materials*, *supra* note 494, at 299.

496. See Ronald Staudt, *The Center for Law and Computers: The Electronic Publishing Initiative*, in *Computing Conference Materials*, *supra* note 493, at 292, 293.

497. 1995 Conference on Distance Learning.

engage national databases and produce not only text but also images and sounds along with the text, both in programmed and user-designated formats. Later generations of electronic lawbooks will inevitably benefit from increasingly powerful and inexpensive animation, indexing, and accessing software, as well as more truly interactive hardware.⁴⁹⁸

In the 1995 survey, computer use as a part of instruction was rare, although there are signs it may increase.⁴⁹⁹ A quarter of the 1995 survey respondents use CALI, four percent (18 respondents) requiring, and twenty-one percent (88 respondents) recommending it. On the other hand, sixty-four percent (268 respondents) do not suggest its use, and an honest seven percent (30 respondents) admitted to not knowing what CALI is. Very few respondents (six percent) use interactive computer programs in class.⁵⁰⁰ On the other hand, when asked if one might use them if the availability were known, four percent (17 respondents) replied "certainly," and thirty percent (123 respondents) replied "yes, if the content is pedagogically sound." Twenty-six percent (110 respondents) would use them "only as supplements to lectures." Twenty percent (86 respondents) replied probably not, and six percent (27 respondents) replied "no."

VII. THE STUDENT INITIATIVE

The textual requirements set by the professor are not the only sources of study for the student. An important influence on what the professor accomplishes in the lecture hall are the tools the student employs outside of it.⁵⁰¹ Indeed, student use of extramural study aids is a venerable tradition. Whether encouraged, condemned, or ignored by the professor, students seem always to have looked away from the syllabus for help in understanding material and cramming for exams.

As one could see from the study of Marshall with Wythe, Story with Sewell, and Kent with Stiles and Benson, the student was expected to complete much of his own study with little guidance from his elders. The books that were assigned, in particular the Reports, Coke, and Blackstone were jumbles of information that were difficult to understand. Furthermore, the information the student did understand needed to be committed to memory. The market for books with which to sort all this out was, and continues to be, immense.

As noted earlier, the legal catechism, or law student quizzer, was a

498. For a moving discussion of these developments, see Matasar & Shiels, *supra* note 492, at 909.

499. "Do you suggest students perform supplemental computer assisted legal instruction (CALI)? (1) yes (2) no (3) I have no idea what this is."

500. "Do you use interactive computer programs in presenting any of your course material in class? (1) yes (2) no."

501. As one of the author's colleagues describes student use of commercial study aids: "The students prefer the Europeans to us—the French scholar Gilbert, the Italian Legalines, the Israeli Emanuel, even the Englishman Nutshell."

popular means of both extracting information from various treatises and committing them to memory. In the 1800s, in addition to the quizzers for the book-by-book study of Blackstone⁵⁰² and Kent,⁵⁰³ there were series of questions and answers developed for exams in particular courses.⁵⁰⁴ Numerous quizzers were created for the use of students in particular schools.⁵⁰⁵ One of these may well have been the namesake of a familiar modern stepchild. *The Law in a Nut-Shell* was a quizzer developed for sale to Columbia students in 1878.⁵⁰⁶ An important use of the quizzer was to prepare for bar exams in a jurisdiction, and a question-and-answer book existed for this purpose in Scotland by 1821.⁵⁰⁷ The practice in America grew widespread, fueled in part by correspondence schools of law,⁵⁰⁸ with

502. See, e.g., Barron Field, *An Analysis of Blackstone's Commentaries on the Laws of England, in a Series of Questions, to Which the Student Is to Frame His Own Answers by Reading That Work* (London, T. Cadell and W. Davies 1811); Asa Kinne, *The Most Important Parts of Blackstone's Commentaries Reduced to Questions and Answers* (New York, W.E. Dean 1838); John C. Devereux, *The Most Material Parts of Blackstone's Commentaries, Reduced to Questions and Answers: Upon the Plan and in the Place of Kinne's Blackstone* (New York, Baker, Voorhis & Co. 1875); William Sprague, *Blackstone Quizzer D . . . Being Questions and Answers on Book 4 of Blackstone's Commentaries, For Students Preparing for Examination for Admission to the Bar* (Detroit, Michigan, Collector Publishing Co., 3d ed. 1896).

503. See, e.g., Asa Kinne, *The Most Important Parts of Kent's Commentaries, Reduced to Questions and Answers* (New York, W.E. Dean 2d ed. 1840).

504. See, e.g., George Gardiner Fry, *Questions and Answers on Municipal Law: Containing About One Thousand of the Most Important Questions Propounded to Law Students, Both at the New York Supreme Court and Columbia College Law School Examinations* (New York, Baker, Voorhis & Co. 1895).

505. See, e.g., Walter Smith Cox, *Questions for the Use of Students in the Junior Law Class of Columbian University* (Washington, D.C., W.H. Morrison 1886).

506. See Morris F. Dowley, *The Law in a Nut-Shell, Comprising Concise and Lucid Answers to Five Hundred Leading Legal Questions, Including All Questions Propounded to Law Students at the Prize Examinations of Columbia College, A Synopsis of the Laws Governing Husband and Wife, The Rates of Interest, and the Statutes Against Usury in the Several States; and A Miniature Dictionary of Law Terms Culled From Standard Legal Authors* (New York, Ward & Peloubet 1878). After such a loquacious title, the publisher noted on the cover, "Be brief, be pointed . . ."

507. See *A Summary of the Law of Scotland, by Way of Question and Answer, in the Order of Mr. Erskine; Chiefly Adapted to the Use of Gentlemen on the Eve of Trial as Advocates, Writers to the Signet, and Solicitors or Agents, Either Before the Supreme or Inferior Courts* (Edinburgh, Bell & Bradfute 1821).

508. The role of correspondence legal education seems to have been quite significant at the dawn of the century, although it has since radically declined. See generally Elridge B. Pierce, *Correspondence Law Schools*, J. Legal Ed. 160 (1951). The earliest of these programs appears to be the Blackstone School of Law, the 1890 creation of William C. Sprague, who appears to have had a close relationship with the major producer of quizzers. See, e.g., Griffith O. Ehlig, *Quizzer No. 10, Being Questions and Answers on Bills, Notes, and Cheques for Students Preparing for Examination for Admission to the Bar or for Advanced Standing in Law Schools or for Review in Connection with Text Books and Lectures* (Detroit, Michigan, The Collector Publishing Co. 1897); Emil W. Snyder, *Quizzer No. 7, Being Questions and Answers on Equity, Pleading, and Practice for Students Preparing for Examination for Admission to the Bar or for Advanced Standing in Law Schools or for Review in Connection*

numerous general law quizzers created for law student use.⁵⁰⁹ There was even a national magazine of law school questions and tactics, *The Law Student's Helper*, published monthly from Detroit in the 1890s.⁵¹⁰ The life of the quizzer continues in one form in bar preparation materials sold commercially in the late twentieth century through companies who make it a primary product, such as BarBri, as well as the ubiquitous West Publishing Co. In its other form, the modern quizzer exists in both a few vestigial quiz books, such as *Ballantine's*⁵¹¹ and in the frequent law school practice of maintaining files of old examinations for student review.⁵¹²

Another favored study aid is the outline. Initially part of a student tradition of manufacturing copies of heralded outlines of former students, the outline became commercially institutionalized at least by the 1890s. The basic premise of an outline is to distill the details and examples in a book or lecture to their essence and arrange their ideas in a progressive order.⁵¹³ In many regards, the outline is the grandfather of two modern forms of study aids, the canned brief and the commercial outline.

Canned briefs seem, unsurprisingly, to have originated in the casebook creche at Harvard, where class notes and study materials appear to have been sold in the Harvard Coop by the turn of the century.⁵¹⁴ In

with Text Books and Lectures (Detroit, Michigan, The Collector Publishing Co. 1900); William C. Sprague, Quizzer No. 13, Being Questions and Answers on Partnership for Students Preparing for Examination for Admission to the Bar or for Advanced Standing in Law Schools or for Review in Connection with Text Books and Lectures (Detroit, Michigan, The Collector Publishing Co. 1899). Further discussion of the Blackstone College curriculum is in its false advertising defense. See Pierce, *supra*, at 165-67 (discussing *In re* Blackstone College of Law, Inc., 44 F.T.C. 756 (1948)). The scheme of competing programs is depicted in James P. Downs, Introductory Lecture to a Series of 26 Lecture-Lessons Embodying William Raymond Board's Principles of American Law, which Constitute a Course of Study at the New York Correspondence School of Law (Harrisburg, J.H. McFarland 1892), as well as the massive *Cyclopedia of Law Produced for the American Correspondence School of Law* (Charles E. Chadman ed., 1908) (12 vols.). For a more general account of correspondence schools, see Harry W. Ballantine, *The Place in Legal Education of Evening and Correspondence Law Schools*, 4 Am. L. Sch. Rev. 369 (1919).

509. See, e.g., Edwin Baylies, *Questions and Answers for Law Students* (Albany, New York, W. Gould & Co. 1888); Russell Whitman, *Law Students' Review and Quiz Book in the form of Questions which Supply Concrete Statements of Facts and Of Answers which Set Forth the Legal Principles Involved* (1916).

510. See Griffith Ogden Ellis, *Questions Answered and Difficulties Met for Students of Law: Being Questions and their Answers that Appeared During One Year*, in *The Law Student's Helper*, A Monthly Magazine for Law Students (Detroit, Michigan, The Collector Publishing Co. 1899).

511. *Problems in Law For Law School and Bar Examination Review: A Collection of Concrete Problem with Solutions Covering Principle Topics* (Henry W. Ballantine ed., 1927). This is truly the most massive of the quizzers, running near to 1500 pages in each edition.

512. For a short chronicle of the printing of exams for distribution, see Sheppard, *Informal History*, *supra* note 8.

513. See W.C. Bates, *Exponential Outline with Definitions of Blackstone's Commentaries* (Columbus, London Printing & Publishing Co. 1893).

514. A mimeographed, bound copy of Williston's lectures, running 118 pages of legal sized paper, is both testament to the thriving industry of out-of-class shortcutting and to the

the late twentieth century, several commercial vendors do land-office business selling distilled principles of cases, organized to correspond to successful casebooks in most courses. Every case is rendered and reduced into eight parts: the nature of the case, a fact summary, the concise rule of law, the facts, issue, holding and decision, the dissent (if there is one), and the editor's analysis.

Commercial outlines, on the other hand, are little more than student editions of treatises. Popular current products include some produced by young attorneys as well as others written by the same professors who write course books. Steven Emanuel published his first student outline in 1974, a typewritten review of Civil Procedure, and sold it to his first-year classmates at Harvard, who bought 112 copies at \$6.00 each. Business has improved in the following decades, and Emanuel's company now sells more than 150,000 study aids every year, including books, flash cards, audio tapes, and computer software.⁵¹⁵ Harcourt Brace Legal & Professional Publications, Inc., provides Gilberts outlines, written by faculty members of various law schools, Legalines, which include case summaries with treatise-like notations, and audio tapes of famous lecturers on the most common large-lecture courses.⁵¹⁶ West Publishing produces a line of miniature treatises, known as "Nutshells," in so many courses, that they occasionally act as primary texts when few other materials are available.⁵¹⁷

There are, of course, other providers of these materials, and one of the faster growing markets is for computer programs of questions and answers.⁵¹⁸ Law students seem not only to be a rich market for study aids, but also relatively constant consumers, regardless of their school's culture. The author of this Article compared student purchasing patterns at Harvard, a school of considerable admissions selectivity, and Thomas Cooley, a school with a liberal admissions policy, and found surprisingly similar levels of first-year consumption of these books. In 1995 book store managers at both schools estimated an average sale of three commercial study guides for each first-year casebook sold.⁵¹⁹

method by which Williston ran his courses. The notes, bound and apparently sold in later years of Williston's lecturing through the Harvard Cooperative Bookstore, are thorough recitations of Williston's classes, including long discussions of general principles, hypothetical questions and answers, and case discussions. The typical notation of a case is brief, only a few lines of facts, followed by a holding and a paragraph-length rationale. Williston Lectures on Contracts, 1894-95 (unpublished manuscript, Harvard Law Library no. 5602). Reproduced class notes are, of course, older than this, as seen in Judge Gould's complaints of lecture piracy at Litchfield, in the text near notes 86 and 87 above, and as demonstrated by the Penn. planographs described above in notes 190-193.

515. Steven Emanuel, *Some Thoughts About the First Year of Law School* (1994).

516. Gilbert Law Summaries Product Catalog (1994).

517. Telephone conversation between the author and Brett Arnold, July 1995, and January 1997. For instance, the Nutshell on Art Law, Leonard DuBoff, Art Law (2d ed. 1993), is an assigned coursebook in law and the arts at Boston University, John Marshall, and Georgia State. *Id.*

518. See, e.g., *The Law in a Flash Study Series* (1995).

519. Telephone Interviews with Andy Metheny, the store manager of the Harvard Coop,

Law professors react with a variety of degrees of support or resistance to student use of student study aids. In the 1995 survey, most professors either ignored them or discouraged their use, with a slightly greater displeasure shown toward canned briefs. Only one percent recommended the use of canned briefs, as opposed to thirty percent who discredited their use, and fifty-three percent who ignored them.⁵²⁰ Slightly less harsh reactions were directed toward commercial outlines: five percent recommended them, only twenty-two percent discredited them, and fifty-eight percent ignored them.⁵²¹

The fact remains that students have used, and will likely always use, a host of materials to order and truncate the course materials. Seemingly, the purpose of such use is less for general comprehension than for preparation for examinations. The pursuit of this singular purpose—getting desired grades—will almost certainly persist as a more significant goal for students than reconciling themselves to the pedagogical goals of the professor. Therefore, student reliance on these materials will inevitably alter the work promoted by the professor in the classroom.

VIII. CONCLUSIONS

The law schools of America exist with a fundamental purpose—to provide graduate education in the law and so to prepare their students to engage in the practice of law. This is an ambiguous goal, and yet over time it has become clear that schools have met these goals by the synthesis of two particular aims: to train students specifically to know the rules of the law and to educate them broadly and critically to understand the operation of those rules by and upon people. At different times and in different types of institutions, one emphasis has been more in vogue than the other, and these emphases may well have shifted in accord with shifts in the culture beyond the walls of law schools.

The books and teaching techniques used in law schools have varied over time, following a few general paths, but with remarkable variation and experimentation. Several of these techniques were popular at times when particular strategic emphases were popular (or were later thought to have been popular). Thus, the treatise was seen to have promoted training, and the casebook, initially, to promote education, each book doing so at the expense of the other's goals. Even so, arguments over the benefits of treatises and lectures over casebooks and dialogues tend to turn on matters of tradition and not of necessity. Each style is sufficiently similar to the other, and there is sufficient latitude within each style for dissimilarity

Law School Branch, and with Fred Puffenberger, the director of the Thomas Cooley Bookstore (May 1996).

520. Question 53. "How do you react to student use of *commercial briefs of cases*? (1) Recommend (2) Discredit (3) Ignore."

521. Question 53. "How do you react to student use of *commercial outlines of your course*? (1) Recommend (2) Discredit (3) Ignore."

allowing for a simple recognition: the choice of a means is not as important as the choice of the philosophical end of the person employing it. Thus, the choice of material is not what causes a choice of goal; they may be independent.

Returning to the three-step model of legal instruction suggested in the introduction, both training and education require success in all three tasks—learning law, organizing it, and applying it. Thus, it remains clear that these three steps are part and parcel of legal instruction, whether it is designed to train, educate, or both. The movements that might emphasize any one of the three stages or either one of the two goals are not tied to one or another step to pursue a particular goal. They are independent creatures of fashion.

That said, there is an historical relationship that suggests an emphasis of training is generally coupled with a focus on learning and organizing rules of law, and an emphasis of education is usually upon application. Thus, Dwight and the twentieth-century quizzers pursued training with an emphasis on rote memorization and recall. Langdell and his problem-method successors, preoccupied more with education, were keenly focused on application. These observations are rough-edged, but they may suggest an informal, if not a causal, relationship among methods and goals.

Looking beyond the current books of paper and cloth toward the age of computer-delivered lectures, the choice between training and education may become more stark. The computer can train, and it will be able to do so more exactly and more engagingly than most humans can aspire. The human may remain essential, however, in the provision of education; it may never be cost-effective to program a machine with the wherewithal to teach or demonstrate judgment or to respond to questions in which that judgment is manifest. If this limitation prevails, an economically forced division of labor seems imminent. The professor will be either a multimedia producer or an educator personally engaged with the student.

Whether tomorrow's Kingsfields could not accomplish over a cable hookup all that is today done in a lecture hall depends, then, on what we expect tomorrow's Harts to gain from the experience. The personal engagement, the emotional and chemical responses of real human dialogue, may be necessary to some part of training. Likewise, the ability to adapt the content of the class to the understanding and enquiry of the student may be necessary to the student's education. Or, maybe not.

Until then, should law schools use casebooks, dialogues, or problem solving in general? Llewellyn was right to say that asking whether the case system works is "like asking whether eating . . . [leads] to the Good Life."⁵²² In each case, the particular means is necessary to the end, but the terms are too broad to mean one thing, and neither is sufficient.⁵²³ If the purpose of a law school is merely to stuff rules of law down the student

522. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. Legal Educ. 211 (1948).

523. See *id.*

gullet, then we should abandon the casebook. If the purpose is to prepare students to use reason to solve problems using the tools of law, then professors should continue to use cases as they were once employed—as problems and not just as quiz bait. This is not to say that some binary choice is required. Tomorrow's Kingsfield may accomplish both education and training, but only if both are deliberately pursued.⁵²⁴

In reality, numerous variations in pedagogy will continue. The danger will be in selecting or enshrining particular tools for reasons that thwart the underlying goals of education and training. Albert Kales suggested in 1918 that the casebook triumphed because the textbook "lent itself to lazy methods on the part of the student and teacher. It was likely, by its mere form, to degenerate into the student's learning generalizations by rote and the instructor merely quizzing the student perfunctorily about them."⁵²⁵ Whatever the methods employed, such ghastly results as this must be ameliorated by the efforts of individual professors. The professor must remain a wellspring to inspire student work and make possible that work by providing order to the chaotic world of law.⁵²⁶

524. Of course such a path is absolutely essential if law schools are to develop, in any way, toward again becoming the forges of civic virtue. See, e.g., Carrington, *supra* note 187; Hoeflich, *supra* note 131. The satisfaction of a teacher's moral obligation to do so, to teach in the grand manner as did Story, is dependent on such an approach. See Michael I. Swygert, *Striving to Make Great Lawyers-Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. Rev. 803 (1989).

525. Kales, *supra* note 344, at 23.

526. See Peter L. Strauss, *The Metamorphosis of Legal Education*, 30 N.Y.L. Sch. L. Rev. 637, 637-38 (1985) (discussing the reforms proposed by Professor Gorman and arguing that law professors should be more than just vocational instructors).